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128-5-84

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1037.

THOMAS C. CHAPPELL, PLAINTIFF IN ERROR,

vs.

JOHN B. BRADSHAW.

IN ERROR TO THE CIRCUIT COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED JULY 13, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 25, 1888.

1 STATE OF MARYLAND, *sct:*

At a court of appeals of the State of Maryland, begun and held for the said State, at the city of Annapolis, on the second Monday of January, it being the ninth day of said month, in A. D. one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth—present, the Honorable Richard H. Alvey, chief judge, and associate judges, seven, Levin T. H. Irving, John M. Robinson, George Yellott, Oliver Miller, James McSherry, Frederick Stone, Wm. Shepard Bryan—among other, were the following proceedings, to wit:

2 STATE OF MARYLAND, *Howard County,* } *sct:*

At a session of the circuit court for Howard county, in the fifth judicial circuit of the State of Maryland, begun and held at the court-house, in Ellicott City, in and for the county aforesaid, on the first Monday of September (being the fifth day of the same month), in the year of our Lord one thousand eight hundred and eighty-seven—were present, the Honorable Oliver Miller, chief judge; the Honorable I. Thomas Jones, associate judge; Frank Shipley, Esquire, sheriff; L. J. Watkins, clerk—among other, were the following proceedings, to wit:

JOHN B. BRADSHAW *vs.* THOMAS C. CHAPPELL.

The transcript of the record in this case, certified from the superior court of Baltimore city, was filed in our said circuit court for Howard county 23rd April, 1887, which had previously, on the 23rd December, 1886, been certified from the circuit court for Baltimore county to said superior court of Baltimore city.

The following declaration was filed in the circuit court for Baltimore county on the sixth day of January, in the year one thousand eight hundred and eighty-six, to wit:

Declaration.

In the Circuit Court for Baltimore County.

JOHN B. BRADSHAW *vs.* THOMAS C. CHAPPELL.

John B. Bradshaw, by B. Howard Haman, his attorney, sues Thomas C. Chappell—

"1st. For that the plaintiff's sailing vessel, known as the "Mamie W. Bradshaw," was, on the third day of December, in the year one thousand eight hundred and eighty-five, partially destroyed by fire through the negligence of the defendant and his servants.

2nd. And for that the plaintiff at the time of the commission of the grievances hereinafter mentioned was and still is the owner of a

certain sailing vessel, which heretofore, to wit, on or about
3 the third day of December, in the year one thousand eight hundred and eighty-five, was anchored in the Patapsco river, off Hawkins' Point, and the said defendant was then and there the owner of a certain scow, which, on the night of the said third day of December, was moored or fastened to the wharf of the defendant, at or near Hawkins' Point, said scow being laden with chemicals and other highly combustible materials; whereupon it became the duty of the defendant to use due care and caution in the management of the said scow, but the said defendant, unmindful of his duty in this behalf, negligently and carelessly failed to place a guard in or upon said scow, to keep a close watch over the same lest it should be ignited; in consequence whereof the said scow and the material thereon took fire, and the said scow, becoming freed from its moorings and drifting and being carried by wind and tide into contact with the plaintiff's said sailing vessel, set fire to the same, whereby the plaintiff suffered great loss and damage.

3rd. And for that the plaintiff at the time of the commission of the grievances hereinafter mentioned was and still is the owner of a certain sailing vessel, which heretofore, to wit, on the third day of December, in the year one thousand eight hundred and eighty-five, was anchored in the Patapsco river, off Hawkins' Point; the said defendant was then and there the owner of a certain scow, which, in the night of said third day of December, was moored or fastened to the wharf of the defendant at or near Hawkins' Point, said scow being laden with highly combustible materials; whereupon it became the duty of the defendant without delay to remove the said combustible materials to a place of greater security, but the said defendant, maliciously contriving and designing to injure the plaintiff, disregarding his said duty, negligently and carelessly and without regard to the safety of the property of the plaintiff, permitted the said materials to remain upon the said scow an unreasonable length of time, in consequence whereof the said scow became ignited, and while burning became free from its fastenings through the acts of the agents of the defendant, and, drifting and being carried by wind and tide into contact with the plaintiff's sailing vessel, set fire to the same, whereby the plaintiff suffered great loss and damage.

4th. And for that the plaintiff at the time of the commission of the grievances hereinafter mentioned was and still is the owner of a certain sailing vessel, which heretofore, to wit, on the third day of December, in the year one thousand eight hundred and eighty-five, was anchored in the Patapsco river, off Hawkins' Point, and the said defendant was then and there the owner of a certain scow, which, on the night of the said third day of December, was by the agents of the defendant attempted to be fastened to a wharf of the defendant situated at or near said Hawkins' Point; whereupon it became the duty of the defendant and his agents safely and securely to attach the said scow to the said wharf, lest damage might otherwise be occasioned to the property of others and the sailing vessel of the plaintiff, but the said defendant, without regard to his duty in that

behalf, and wilfully and maliciously contriving and designing and intending to injure the plaintiff, negligently, carelessly, and unskillfully fastened the said scow to the said wharf; in consequence whereof the said scow, becoming ignited from some cause to the plaintiff unknown, was freed from its fastenings through the acts of the agents of the defendant, and, drifting and being
4 carried by wind and tide into collision with the plaintiff's said sailing vessel, set fire to the same, whereby the plaintiff suffered great loss and damage.

And the plaintiff claims two thousand five hundred dollars damages.

B. HOWARD HAMAN,
Attorney for Plaintiff.

The following plea was filed in the circuit court for Baltimore county on the 14th May, 1886:

Plea.

In the Circuit Court for Baltimore County.

JNO. B. BRADSHAW *vs.* T. C. CHAPPELL.

The defendant, Thomas C. Chappell, by his attorney, David G. McIntosh, for a plea in this case says—

That he did not commit the wrong alleged.

D. G. McINTOSH,
Att'y for Def't.

On the 19th September, 1887, issue was joined in our said circuit court for Howard county; same day, jury sworn.

22nd September, 1887.—Verdict for plaintiff; damages assessed at $1,500.00.

24 Sept., 1887.—Motion for new trial f'd.

30 Sept., 1887.—Motion to set motion for new trial for hearing on Saturday, 8 Octo., 1887, at 10 o'cl'k; case set for 8 Octo.

21 Nov'r, 1887.—Order for appeal f'd.

5 Dec'r, 1887.—Bill of exceptions f'd.

6th Dec'r, 1887.—Motion for new trial withdrawn, and judgment on verdict in favor of plaintiff for $1,500.00, with interest from 6 December, 1887, and costs.

6th Dec'r, 1887.—Order for appeal filed.

14 Dec'r, 1887.—Affidavit of def't that appeal was not taken for delay f'd; same day, appeal bond f'd and approved.

Heretofore, to wit, on the 5th December, 1887, the following bill of exceptions was filed, to wit:

Bill of Particulars. F'd 5th December, 1887.

In the Circuit Court for Howard County. September Term, 1887.

JOHN B. BRADSHAW *vs.* THOMAS C. CHAPPELL.

Defendant's Bill of Exceptions.

The plaintiff, to sustain the issue on his part joined, offered the following evidence:

JOHN B. BRADSHAW testified: I reside in Somerset county, Maryland, and have been engaged in the oystering business for some years. I left Booth's wharf, Baltimore, on or about the 3rd of December, 1885. I was not sure about going down the bay, as the weather looked rough; knew I would go down the river. It was blowing so heavy when we got down to Hawkins' Point, I thought we would go in there and lay in a while, where it has been a harbor for vessels like mine since before I was born. There is a cove there. I guess it has been a harbor since Baltimore was a city. We dropped anchor and put up our proper lights—one of which was at the mast-head—and all hands went below and went to sleep. It was mostly a fresh crew, just shipped, and some of the men had been drinking. I staid awake, laying below on a locker, keeping an anchor watch and waiting for calmer weather. I was first up, then down, looking around, but there was no one on deck at the time of the accident or the fire. Vessels like mine, when they are at anchor, except in the bay, do not keep a watch on deck; it is not the custom. They hoist their lights, and that is all. I heard a knock under the bow of the vessel and thought a vessel got under way and had run into her. I came out and it was on fire. It was a scow on fire. It come afoul of us and it was caught in the bowsprit and fore rigging. My vessel was anchored about two hundred yards from Chappell's wharf. When I anchored I only noticed one other vessel, but later twenty or thirty more anchored there. There was no lookout or watch stationed on deck. It was about ten o'clock at night when I heard the knock. My vessel was damaged badly by the fire. I repaired her to the extent of from one thousand dollars to fifteen hundred dollars, but after the repairing was done she was not worth more than half she was before. She was worth forty-five hundred dollars before the fire; that he saw a man in a boat lying about thirty yards off his vessel, after the scow had collided with it.

The plaintiff further offered evidence tending to prove that the wharf spoken of in the plaintiff's testimony belonged to the defendant and was used by him in connection with his fertilizer factory, which was near the wharf; that the burning scow belonged to the defendant; that in the afternoon of the 3rd of December, 1885, about five o'clock, the scow was fastened to the wharf of the defendant at Hawkins' Point, and was lying outside of another scow which was

alongside the wharf. The outside scow was lashed to the wharf and to the inner scow. The ropes allowed a play of about three feet between the two scows; that she was laden with twenty-five carboys filled with nitric acid and some old furniture. There was no light or match on the wharf or on either of the scows. A carboy is a wooden box filled with straw, in the midst of which is a large bottle with a glass stopper; that nitric acid is inflammable and likely to produce fire if brought in contact with straw or other substances; that the scow was on fire about ten o'clock that night, and was cut loose and set adrift by an employé of the defendant by order of the watchman who had charge of the defendant's factory. No employé of the defendant was present when the scow took fire; that when the scow was set loose the wind was blowing in a direction from the wharf of the defendant and towards the plaintiff's vessel; that when the man Jess, spoken of in the defendant's testimony, started out with his boat to give notice to the plaintiff's vessel, the scow had drifted half way to the plaintiff's vessel.

JOSHUA F. THOMAS testified on behalf of the plaintiff: I was anchored in Hawkins' Point that night. I was about thirty yards from Captain Bradshaw's boat; it might have been a little more or a little less. We were about one hundred and fifty to one hundred and seventy-five yards from the wharf. I think there were twenty-five or thirty oyster vessels there; oyster vessels frequently run in there for a harbor. I was on deck that night. I saw the scow on its journey. I heard some hallooing and I come on deck; it seemed as if the voice came from the shore, and I saw the scow come down; I saw the scow when about twenty-five or thirty yards from the wharf; I saw it was coming directly for me and thought it was coming into collision with me. We tried to get the anchor up and found we could not do it in time to get out of the way of the scow; the chain had some kinks in it, as they generally do. When she was about half way to us she turned and went towards Captain Bradshaw's vessel. If he had hoisted his jib it would have thrown his vessel about, but it is impossible to say in what direction. The house of the scow was on fire. It was what is called a covered scow or house scow. The house was several feet from the end of the scow, and the bits on the scow, by which it was attached to the wharf by its ropes, were on the end of the scow away from the house and were not burnt. The people on the wharf could have played her out into the stream and held her there by her ropes, and they could easily have notified Captain Bradshaw's vessel. A boat could be rowed out faster than a scow could drift. It is not customary for such vessels to keep a lookout on deck when anchored in a place like that. Bradshaw's vessel had her proper lights burning.

The defendant offered evidence tending to prove that the said carboys mentioned in the evidence of the plaintiff contained aqua fortis; that aqua fortis is the nitric acid of commerce and is of a lower degree of specific gravity than chemically pure nitric acid; that the defendant had been purchasing and dealing in aqua fortis

for many years; that aqua fortis of the degree of specific gravity and character used by defendant was not inflammable and could not produce fire; that the scow was securely fastened to defendant's wharf on afternoon of December 3rd, 1885, and, owing to high wind and rough sea, it was dangerous to unload the carboys from the scow; that when the fire was discovered an alarm was given; that an employé of defendant, named Jess, rowed towards the plaintiff's vessel to give notice, but how far he went or what he did was not stated; that there was no lookout or watch on deck of plaintiff's vessel.

The defendant further proved by one Johnson, who was the captain of the tug-boat which had towed the scow to the defendant's wharf and had followed the water as a seaman for many years, that the plaintiff might have raised his jib and caused his vessel to swing around, and that if this had been done the vessel would probably have escaped.

On cross-examination this witness stated that raising the jib would not have given the capt. complete control over his vessel and she would have swayed to and fro in the wind; that it would depend on which side the sail filled whether she would go to the right or left of her anchor to the extent of the length of her cable.

Whereupon the plaintiff offered three prayers:

Plaintiff's First Prayer.

If the jury shall find from the evidence in the case that the plaintiff's boat was damaged by fire at the time mentioned in the declaration that the said damage was caused by the negligence of the defendant's agents, then the plaintiff is entitled to recover a ver-
7 dict unless the jury believe that the plaintiff or his agents contributed directly to the happening of the accident by their own negligence.

Indorsed: (Granted.)

Plaintiff's Second Prayer.

Even although the jury should find that the fire on the scow was not caused by the negligence of the defendant or his agents, and, further, that it was a reasonable and necessary precaution for the security of the defendant's property to cast loose the burning scow, still it was the duty of the defendant's agents to use due and reasonable care to avoid damage to the plaintiff's vessel, and if they shall find that the defendant's agents did not use such reasonable care, and that by the exercise of such reasonable care the accident might have been avoided, then the plaintiff is entitled to recover unless the jury find that the plaintiff by his own negligence directly contributed to the happening of the accident.

Indorsed: (Rejected.)

Plaintiff's Third Prayer.

Even though the jury may believe that the plaintiff was guilty of negligence in not keeping a watch on deck when his vessel was anchored in the Patapsco river, still if the defendant's agents might have avoided the injury to the plaintiff's vessel by the exercise of reasonable care and prudence on their part, then the plaintiff will not be prevented from recovering by reason of any such supposed negligence on his part.

Indorsed: (Rejected.)

And the defendant offered four prayers:

Defendant's First Prayer.

The defendant prays the court to instruct the jury that they cannot find for the plaintiff unless they find that the damage sued for was caused directly by some negligence on the part of the agents of the defendant, and also without the neglect of the plaintiff of any reasonable precaution by which the damage might have been prevented.

Indorsed: (Granted.)

Defendant's Second Prayer.

The defendant prays the court to instruct the jury that if they find that at the time of the collision the plaintiff's vessel, with several others, had anchored in the water off Hawkins' Point, mentioned in the evidence, by reason of the force of the wind, and that said place was a known roadstead or harbor for vesssls of the kind owned by the plaintiff; and if they find that the plaintiff had twelve men in his crew, and, with other vessels anchored near, was waiting for the wind to subside before going on his voyage down the Patapsco, then it was an ordinary and proper precaution for the plaintiff to have had a watch on deck of his vessel, and his failure to have such a watch was negligence on his part; and if the jury find that he had no such watch and that he kept no lookout at all up to the time of the collision, and that had there been such a lookout notice of the approach of the burning scow mentioned in the evidence could have been given to the plaintiff in time to enable him to take precaution to prevent a collision, and that such precautions, with such timely notice, could have prevented the collision, the plaintiff is not entitled to recover.

Indorsed: (Rejected.)

Defendant's Third Prayer.

And also to instruct the jury that the defendant was bound to use only such care and prudence in transporting or keeping the

8 cargo of the burnt scow as a man of ordinary prudence would use in keeping and transporting the same kind of cargo, and was not bound to use extraordinary care in keeping or transporting the same, if the jury find that it was not in fact a substance apt to cause fire.

Indorsed: (Granted.)

Defendant's Fourth Prayer.

That even if the jury find for the plaintiff they are confined in estimating the damages under the pleadings and evidence in the case to the injuries sustained by the plaintiff's sailing vessel from the fire imparted by the collision with the burning scow, if the jury find the same.

Indorsed: (Granted.)

And the court granted the plaintiff's first prayer and rejected his second and third prayers and granted the first, third, and fourth prayers of the defendant and rejected his second prayer; to which ruling of the court in granting the first prayer of the plaintiff and in rejecting the second prayer of the defendant the defendant excepted and prays the court to sign and seal this his bill of exceptions; which is accordingly done this twenty-second day of September, 1887.

OLIVER MILLER. [SEAL.]
I. THOMAS JONES. [SEAL.]
—— ——. [SEAL.]

STATE OF MARYLAND, *Howard County*, } *To wit:*

I hereby certify that the aforegoing is truly taken from the record of the proceedings of the circuit court for Howard county in the above-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the circuit court for Howard county this 14th day of December, A. D. 1887.

[Seal's place.] L. J. WATKINS, *Clerk.*

9 Court of Appeals of Maryland. January Term, 1888.

THOMAS C. CHAPPELL *vs* JOHN B. BRADSHAW.

Judge MCSHERRY delivered the opinion of the court:

The appellee, being the owner and the master of an oyster schooner, sailed from Baltimore early in December, 1885, and in consequence of rough and heavy weather anchored in a cove off Hawkins' Point, in the Patapsco river, about one hundred and fifty or two hundred yards from a wharf owned by the appellant. This wharf was used by the appellant in connection with his fertilizer factory, situated near by. The cove was frequently used by vessels like that of the

appellee's for shelter in stormy weather, but at the time the appellee entered it on the occasion in question there was but one other vessel there, though later the same evening and night some twenty others arrived and anchored. Shortly before the appellee anchored and on the same afternoon a scow belonging to the appellant and
10 containing nitric acid in carboys, intended for use by the appellant at his factory, was towed up to the wharf already mentioned, and was there made fast by ropes to another scow which was attached in the usual manner to the wharf. When the appellee anchored he put up his proper lights, one of which was at the masthead, but he placed no "anchor watch" on deck, having sent his crew below, though he himself went "up and down looking around." About ten o'clock of the same night the scow containing the nitric acid took fire from some unexplained cause, and the watchman at the wharf and in the appellant's employment caused the burning scow to be cut loose; whereupon it drifted towards and came in contact with the appellee's vessel, and, becoming entangled in the bowsprit and forerigging of the latter, set it on fire, and thereby occasioned it damage and injury. Upon the trial of the action brought by the appellee against the appellant to recover for the damage thus sustained one exception was taken, which presents for review by this court the rulings of the court below in granting the first instruction of the appellee and in rejecting the second prayer of the appellant.

11 The instruction granted at the instance of the appellee is undoubtedly free from objection and has been repeatedly sanctioned and approved by this court in cases involving negligence as the cause of action. It submitted to the jury to find whether the injury to the schooner was occasioned by the negligence of the appellant's agents, and in the event of such being found to be the case authorized a recovery unless the jury further should find that "the plaintiff or his agents directly contributed to the happening of the accident by their own negligence." Thus the alleged negligence of the appellant and the alleged contributing negligence of the appellee were both fully and fairly put in this instruction to the jury for their finding. The legal propositions of the instruction and the form in which they are presented in it are sustained by numerous cases in this court and elsewhere. This instruction and the first instruction granted at the instance of the appellant submitted the law of the case to the jury as favorably to the appellant as he could have asked for, unless it be true that the question of contributing negligence was one of law to be determined by the
12 court, as insisted in the appellant's second prayer, and not one of fact to be proved by the jury under the particular circumstances of this case.

This rejected prayer of the appellant asked the court to instruct the jury as matter of law that "it was an ordinary and proper precaution for the plaintiff to have had a watch on deck of his vessel, and his failure to have such a watch was negligence on his part," &c. It was argued before us with great zeal and marked ability that this prayer ought to have been granted. There was evidence

before the jury to the effect that if there had been a watch on deck the danger could have been seen, and that by hoisting a jib the schooner would have swung or swayed around the length of her cable, and that thus the collision with the burning scow might have been avoided; but it was also in evidence that the direction which the schooner would have taken in this swaying or swinging around was entirely conjectural, and that thus it was possible that she might have been placed, by this very means, in an even more perilous position than she was.

We are not prepared to give our assent to the theory of
13 this prayer and to announce, as a conclusion of law, that the absence of an "anchor watch" was, under the circumstances of this case, an act of negligence on the part of the appellant, contributing directly to the injury complained of, and, of course, therefore, barring the right of the plaintiff to recover therefor. Negligence is relative or comparative. An act or an omission to do some act may be either indifferent or negligent, as its surrounding and coincident circumstances give to it the one or the other character. Different surroundings and circumstances present different degrees of peril. The degree of peril determines the measure of the precaution requisite to prevent injury. Hence, from the very nature of the case, there cannot be, as there is not, any uniform and unvarying standard, applicable alike to all cases, by which an act or a failure to do some act can be distinctly defined as being contributing negligence. In many instances negligence or contributing negligence is purely a question of fact for the finding of the jury; in others, some pronounced indisputable act or omission, so marked and unequivocal as to leave no room for any other characterization, will warrant a court in ruling that it is, in law, negligence of itself.

14 Where the question is one depending upon a variety of circumstances, or where the testimony is conflicting in regard to them, or where different inferences may be drawn from the evidence upon that subject, or where there may be a reasonable ground for question as to whether the act or omission alleged to be contributing negligence did, in fact, contribute directly to the production of the injury, the jury has been held to be the proper tribunal to determine whether such act or omission amounts to the imputed contributing negligence. Whether, therefore, the appellee was negligent in not anticipating and foreseeing the possibility of the scow taking fire, and of its being then set adrift without the employment of any means to manage or direct it, depended upon what the jury, on all the evidence, might find that an ordinarily prudent and careful man would have done in the same situation. He was not anchored in the track of navigation, but in a cove resorted to only by small craft like his own for shelter, and his vessel was within a short distance of a wharf. The utmost which it is insisted an "anchor watch" could have accomplished
15 would have been the hoisting of a jib, and that, as already stated, might have avoided the injury or it might have increased the hazard and caused even more serious damage than actu-

ally did occur. As, from the nature of the surroundings, it was more improbable that a collision would occur from any cause in that cove than upon the open bay or river, there was less reason for watchfulness there than in the latter instance. Whilst the absence of a proper watch would, under certain conditions, where the risk is great, amount to negligence, as decided by this court in Kerr's case, 33 Md., 331, the same omission, where there would be very slight, if any, probability of injury, could not be thus characterized. Hence, under all the circumstances, it was proper for the jury to determine, as a matter of fact, whether the appellee was guilty of contributing negligence in not having provided the "anchor watch;" and it was not, therefore, a question of law to be decided by the court.

The cases relied upon by the appellant in support of this prayer are chiefly in the admiralty; but the mode of proceedure
16 there is materially different from that which obtains in courts of common law. In the one jurisdiction the law and the facts, ordinarily, are both passed upon by a single judge, and his conclusions in respect to the acts which constitute negligence are frequently mixed ones of law and fact. However entitled to deference and respect such conclusions may be, they cannot in the other jurisdiction, where the province of the court is distinct from that of the jury, be accepted as establishing the doctrine that the absence of an "anchor watch" is, in law, of itself under all circumstances contributing negligence. By following in the case at bar these decisions in the admiralty and by thus reacting from the master of an oyster pungy situated as this one was the same precautions which are demanded of the masters of totally different vessels, both at anchor and afloat, in localities unlike this cove and in positions of far greater hazard, we would effectually obliterate the relative or comparative feature of negligence. This would be in conflict with long-settled principles.

17 Under the granted instruction it was perfectly competent for the jury to have found a verdict for the appellant had they deemed the absence of the watch an act of contributing negligence directly concurring in producing the injury.

It was likewise competent for them to treat the absence of such a watch under the circumstances as not amounting to such negligence.

Not deeming this act of alleged negligence to be of that character which justifies the court in ruling that it is in law contributing negligence directly contributing to the injury complained of, when considered in connection with all the other circumstances of the case, we think that the prayer which we have just been discussing was properly rejected.

Finding no errors in the rulings excepted to, the judgment will be affirmed.

Judgment Affirmed.

18 Judgment affirmed by the court on the fourteenth day of March, eighteen hundred and eighty-eight, for the sum of fifteen hundred dollars ($1,500.00), current money, damages, with in-

terest thereon from the sixth day of December, eighteen hundred and eighty-seven, until paid, —— costs in the lower court, and twenty-three dollars and seventy-five cents in the court of appeals of Maryland.

SPENCER C. JONES,
Clerk Court of Appeals of Maryland.

19 In the Court of Appeals.

THOMAS C. CHAPPELL *vs.* JOHN B. BRADSHAW.

To the honorable the judges of the court of appeals of Maryland:

Thomas C. Chappell, the appellant in the above cause, moves the court to grant him a reargument of said cause upon the following grounds:

1st. That the instructions of the court below to the jury were erroneous, in that they did not instruct the jury to limit the amount of damage the plaintiff could recover to the value of the colliding scow, according to the law of the United States, as provided in section 18 of chapter 121, of 1884 (U. S. Statutes at Large, Vol. 23, page 57), which provides: "That the individual liability of a ship-owner shall be limited to the proportion, if any, or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending"—

The said statute being passed by virtue of the eighth section of the first article of the Constitution of the United States: "The
20 Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the Government of the United States or in any department or officers thereof," and so passed for the purpose of executing the power conveyed by the Constitution under the third clause of the same, "To regulate commerce with foreign nations and among the several States, and with Indian tribes;" and also in pursuance of the first section of said article, to provide for the "general welfare of the United States."

2nd. The court below was bound to take notice of the said act of Congress hereinbefore referred to, in accordance with the sixth article of the Constitution of the United States, which provides: Section 2, "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." The court of appeals in the case of Day *vs.* Day, 22 Md., 539, decides: "We are bound to decide according to existing laws, even though a judgment, rightful when rendered by the court below, should be reversed as a consequence."

21 3d. And for other reasons to be heard upon reargument, should the same be granted.

March 27th, 1888.

FRANCIS P. STEVENS,
Att'y for Thomas C. Chappell.

On the 20th of April, 1888, the foregoing motion for a reargument was overruled, and accompanying the ruling of the court was the following opinion by McSherry, J.:

We have been asked to order a reargument in this case. The only reason assigned is that the circuit court for Howard county did not, in its instruction to the jury, limit the measure of damages to the value of the scow which occasioned the injury complained of. It is insisted that such a limit should have been applied under the provisions of section 18 of chapter 121 of the act of Congress of June 26th, 1884. It is only necessary to say that this act of Congress was not before the circuit court when the case was tried, nor before this court on appeal, and that no reference to or construction of it was made in either court. As no question was made under it in the court below, we could not, as the law stands in this State, have considered it, even had our attention been called to it during
22 the argument in this court. There was no evidence offered by the appellant in the court below with respect to the value of the scow alluded to, and the appellant did not then seek to restrict his liability by relying upon this statute. It would, in the absence of all evidence on this subject, have been idle and useless for the court to instruct the jury that the appellee could recover no greater sum than the value of the scow. If the act of Congress be applicable to this case (and this is a point which we expressly do not decide) the appellant failed to invoke its provisions at the proper time and neglected to offer any evidence for the guidance of the jury in ascertaining the value of the scow. It is now too late to ask us to reverse the judgment and to send the case back solely for the purpose of enabling the appellant to make a defence merely with respect to the measure of damages, which defence, if allowable at all, could have been just as fully and effectually made upon the trial already had as it could possibly be upon any new trial hereafter.

The motion for a reargument must be and is overruled.

Motion overruled.

23 In the Court of Appeals.

THOMAS C. CHAPPELL *vs.* JOHN B. BRADSHAW.

To the honorable Richard H. Alvey, chief judge of the court of appeals of Maryland:

The petition of Thomas C. Chappell, a citizen of the State of Maryland, respectfully represents—

That a final judgment has been rendered in the court of appeals of Maryland in a suit pending therein, where the said Thomas C. Chappell is defendant and appellant and John B. Bradshaw is plain-

tiff and appellee; that the said court of appeals is the highest court of law in the State of Maryland in which a decision in said suit could be had; that the said court of appeals has rendered a judgment against your petitioner for the sum of fifteen hundred dollars in the above-entitled cause; that your petitioner appealed from the court below upon his exception to the instructions of the court to the jury in granting the plaintiff's first prayer and in rejecting the second prayer of the defendant, and that your petitioner has filed a motion for a reargument on the grounds that the instruc-
24 tions of the court to the jury were erroneous and repugnant to the law of the United States—act of Congress of Jan'y 26th, 1884, U. S. Statutes at Large, Vol. 23, chapter 121, section 18 (page 57)—and to the Constitution.

The defendant excepted to the court instructing the jury that the plaintiff was entitled to recover, and claims in said suit that the provisions of said act of Congress aforesaid made it incumbent for said plaintiff, in order to establish a right to recover, to show first that the defendant's vessel was not a total loss; secondly, that it had some value; thirdly, the extent of its value, to show the measure of his recovery, and that the instructions of the court to the jury that from the evidence in the case the plaintiff was entitled to recover a verdict, as set forth in the plaintiff's first prayer, were contrary to law, and the right to recover said judgment involves in said suit the construction of the act of Congress of June 26th, 1884, U. S. Statutes at Large, Vol. 23, chapter 121, section 18 (page 57), and its application to said cause and its operation therein to extinguish the liability of the defendant by virtue of the decision of the Supreme Court, Norwich & N. Y. Transportation Co., 13 Wall., 104; ('x) Norwich Co. *vs.* Wright, 13 Wall., 104; that in said suit the court was in error in instructing the jury that the plaintiff was entitled
25 to recover, there being no evidence to show that the vessel of the defendant was not a total loss, and it being a notorious fact to said court that the vessel of the defendant, being in flames, was valueless, and to the contrary the plaintiff did not show. The limitation of liability of defendant operates as to recovery of plaintiff.

And there is also drawn in question in said suit the proper construction of the Constitution of the United States of America, section 2, article 6:

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under * * * shall be the supreme law of the land, and the judges in every State shall be bound thereby." * * *

That in said suit a right and privilege is claimed under the Constitution, statutes, and law of the United States, and the decision is against the right and privilege set up and claimed by your petitioner under said Constitution and statutes, as appears by this petition and the orders of said court in this case filed herewith.

Wherefore, to the end that the said judgment of the said court of appeals of Maryland may be re-examined and reversed or

affirmed in the Supreme Court of the United States upon a writ of error—art. 3, sec. 2, Constitution, "The judicial power" * * *

Your petitioner prays that a citation may be issued in the same manner as if the said judgment had been rendered in a circuit court of the United States.

And your petitioner further claims the county court was in error in exercising jurisdiction by virtue of sec. 2, art. 3, of said Constitution in said suit; that, in any event, said judgment is void as to its amount of value recovered and measure of damage.

THOMAS C. CHAPPELL.

Upon the foregoing petition Chief Judge Alvey filed the following reasons for dismissing the same:

The act of Congress referred to in the foregoing petition was not set up or claimed under nor in any manner relied on by either party to the cause, either in the court below or this court on appeal, and it was not until after the case had been heard and decided by this court and the opinion filed that the act of Congress was brought to the attention of the court by a motion for reargument of the case. That motion was overruled without at all considering whether the act of Congress could have any application to such case, if the defendant had sought to avail himself of its provisions at the proper time and in the proper manner. I shall therefore decline to allow the writ of error and to order the citation as prayed, and shall dismiss the petition, but without prejudice to the right of the defendant, the petitioner, to apply to one of the justices of the Supreme Court of the United States for the allowance of the writ.

April 26th, 1888.

R. H. ALVEY, *C. J.*

In the Supreme Court of the United States.

THOMAS C. CHAPPELL *vs.* JOHN B. BRADSHAW.

The petition of Thomas C. Chappell, the appellant in the above-entitled cause, respectfully represents that he is a citizen of the United States and of the State of Maryland; that he filed in the court of appeals of the State of Maryland, before the end of the term in which the judgment in the above-entitled cause was affirmed and before it had become final, a motion for reargument, which was substantially a motion for reversal of judgment, and specially set up and claimed therein a right, privilege, and immunity under a statute and the Constitution of the United States, a certified copy of which motion is herewith filed, and it is prayed be taken — a part of this petition. The court of appeals of Maryland treated said motion as a motion for a reversal of judgment and for a new trial, and, in overruling said motion, in speaking of the statute of the United States, the court says: "As no question was made under it in the court below we could not, as the law stands in this State, have considered it, even

had our attention been called to it during the argument
29 in this court;" and further said: "It is now too late to ask us to reverse the judgment and to send the case back solely for the purpose of enabling the appellant to make a defence merely with respect to the measure of damages;" and your petitioner further shows that this decision of the said court of appeals is repugnant to the 6th art., 2nd clause of the Constitution of the United States, which provides: "This Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution and the laws of any State to the contrary notwithstanding," which was specially set up and claimed in said court by your petitioner; and said decision of said court of appeals is also repugnant to the 2nd art. of the bill of rights of the State of Maryland, adopted in constitutional convention which assembled at the city of Annapolis May 8th, 1867, and adjourned August 17th, 1867: "The Constitution of the United States and the laws made or which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States are and shall
be the supreme law of the State, and the judges of this
30 State and all the people of this State are and shall be bound thereby, anything in the constitution or laws of this State to the contrary notwithstanding," and therefore the decision of the court of appeals is in error in saying that it could not consider the statutes of the United States (in view of some rule of court or State statute) by reason of the supremacy of the statutes of the United States, by reason of the bill of rights of the State, and the Constitution of the United States, a copy of the opinion of the said court of appeals in overruling said motion being herewith filed, and, it is prayed, may be taken as a part of this petition.

That your petitioner thereafter filed a petition in the said court of appeals in which he specially set up and claimed a right, privilege, and immunity under a statute of the United States, and specially set up and claimed therein a right, privilege, and immunity under the Constitution of the United States, and further specially set up and claimed a right, privilege, and immunity in said cause by rea-
son of incompetency of jurisdiction in said cause of the State
31 court by reason of art. 3rd, sec. 2nd, of the Constitution of the United States, and the said court of appeals overruled said petition, a certified copy of which overruled petition is herewith filed, and it is prayed may be taken as a part of this petition: and the said court of appeals denied the application of your petitioner for a writ of error to the Supreme Court of the United States, without prejudice, however, to the right of your petitioner to apply to one of the justices of the Supreme Court of the United States for the allowance of the writ, as will more fully appear from the certified copy of the opinion of the court, herewith filed; and your petitioner shows that the judgment rendered against your petitioner in said cause is utterly void, as the jurisdiction of the State court in said cause is repugnant to the Constitution and laws of the United States, the said cause being one of maritime jurisdiction, arising in a collis-

ion below low-water mark upon waters where the tide ebbs and flows, and jurisdiction therein is vested in the courts of the United States, exclusive of the courts of the several States; and your petitioner represents a final judgment has been rendered in said suit in the said court of appeals of the State of Maryland, which is
32 the highest court in said State in which a decision could be had, where is drawn in question the validity of a statute and an authority exercised under a State, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision is in favor of their validity, and where a title, right, privilege, and immunity are specially set up and claimed under the Constitution and statutes and authority exercised under the United States, and the decision is against the title, right, privilege, and immunity specially set up and claimed under said constitution and under said statutes.

Wherefore, to the end that the judgment of the court of appeals of Maryland in said cause may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error, it is prayed that a citation may issue in the same manner as if said judgment was rendered in the circuit court of the United States.

THOMAS C. CHAPPELL.

STATE OF MARYLAND, }
City of Baltimore, } *ss:*

33 On this 28th day of May, 1888, personally appeared before me Thomas C. Chappell, the appellant in the above-entitled cause, and made oath on the Holy Evangely of Almighty God that the matters and things stated and set forth in the aforegoing petition are true to the best of his knowledge and belief.

[SEAL.] WM. H. MASSON,
Notary Public.

Writ of error allowed. Citation will issue upon the execution by the petitioner of bond, with surety, in the penalty of three hundred dollars for costs, as required by law, but such bond not to operate as a supersedeas.

May 29th, 1888.

JOHN M. HARLAN,
Associate Justice, Assigned to 4th Circuit.

34 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the court of appeals of the State of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State, in which a decision could be had, in the suit between John B. Bradshaw, plaintiff, and Thomas C. Chappell, defendant, wherein was drawn in question the validity of a treaty or statute of

or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or a treaty or statute of or commission held under the United States, and the decision was
35 against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the thirty-first day of May, in the
36 year of our Lord one thousand eight hundred and eighty-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Justice Supreme Court of the United States.

37 Supreme Court of the United States.

JOHN B. BRADSHAW *v.* THOMAS C. CHAPPELL.

Know all men by these presents that we, Thomas C. Chappell, of Baltimore county, in the State of Maryland; Wm. H. Crawford, of Baltimore city, State of Maryland, and Edward A. Robinson, of Baltimore city, in the State of Maryland, are held and firmly bound unto John B. Bradshaw, of ——, in the sum of twenty-five hundred dollars, to be paid to the said John B. Bradshaw, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this thirtieth day of May, A. D. 1888.

Whereas the above-named Thomas C. Chappell, by my ...

writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the court of appeals of Maryland:

38 Now, therefore, the condition of this obligation is such that if the above-named Thomas C. Chappell shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

THOMAS C. CHAPPELL. [SEAL.]
WM. H. CRAWFORD. [SEAL.]
EDWARD A. ROBINSON. [SEAL.]

Sealed and delivered in the presence of—
W. N. KING.
CHAS. C. FICKENSCHER.

I hereby certify that the above bond for $2,500, with William H. Crawford and Edward A. Robinson as sureties, would be accepted as a sufficient and good bond for that amount in the U. S. circuit court for the d't of Md. I know the pecuniary circumstances of the sureties, and they are ample for the amount.

THOS. J. MORRIS,
U. S. District Judge for Md.

May 31st, 1888.—Bond approved for costs and superseded. Supersedeas and stay of execution allowed and granted.

JOHN M. HARLAN,
Justice Sup. C't U. S.

39 The United States of America to John B. Bradshaw, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Maryland, wherein Thomas C. Chappell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 31st day of March, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN M. HARLAN,
Justice Supreme Court of the U. S.

On this 14th day of June, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared William M. Isaacs before me, the subscriber, clerk of the U. S. district &
40 circuit court, district of Maryland, and makes oath that he delivered a true copy of the within citation to B. Howard Haman, of record for John B. Bradshaw, who endorses hereon [illegible] vice.

WILLIAM M. ISAACS.

Sworn to and subscribed the 14 day of June, A. D. 1888.
[SEAL.] JAS. W. CHEW,
Clerk Dis. & Cr. Court U. S.

Copy served June 13th, 1888, in presence of W. M. Isaacs.
GEO. H. CAIRNES,
U. S. Marshall.

Service of copy admitted this 13th day of June, 1888.
B. HOWARD HAMAN,
For Defendant in Error.

41 STATE OF MARYLAND, *City of Annapolis,* } *To wit:*

I, Spencer C. Jones, clerk of the court of appeals of Maryland, at Annapolis, in obedience to the mandate of a writ of error awarded by the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, bearing date the 31st day of May, 1888, do hereby certify that the foregoing record is a true transcript of the record and proceedings in the case of Thomas C. Chappell *vs.* John B. Bradshaw as the same remains on file in the clerk's office of the said court of appeals.

And I do further certify that the said court of appeals is the highest court of law or equity in said State in which a decision can be had in said case.

And I do further certify that the foregoing bond in said record is a true copy of the bond in said case, which was filed in my office on the second day of June, 1888.

And I do further certify that the foregoing writ of error in said record is a true copy of said writ awarded by the said the
42 Honorable John M. Harlan, associate justice as aforesaid, to the judgment of said court, and I herewith transmit the original of said writ; and I do further certify that a copy of said writ was duly filed in my office for the State of Maryland on the second day of June, 1888.

And I do further certify that the copy of the opinion of the court of appeals in said record is a true copy of the same as rendered by said court in said case and on file in my office, and that said judgment in said court of appeals was rendered on the 14th day of March, 1888.

And I do further certify that the foregoing motion for a reargument of said cause, filed March 27th, 1888, and the opinion of the court overruling the same, filed April 20th, 1888, are true copies and on file in my office.

And I do further certify that the foregoing petition to the Honorable Richard H. Alvey, chief judge, for a writ of error to the Supreme Court of the United States, filed April 23d, 1888, and the opinion of the said chief judge, filed April 26th, 1888, denying the same are true copies and on file in my office.

In testimony whereof I have hereunto subscribed my name

43 as clerk of the said court of appeals of Maryland, and affixed the official seal of said court, at my office, in Annapolis, Maryland, on the third day of July, A. D. 1888.

[Seal Court of Appeals, Maryland.]

SPENCER C. JONES,
Clerk Court of Appeals of Maryland.

Cost of transcript, $8.25.

44 In the Supreme Court of the United States.

THOMAS C. CHAPPELL *vs.* JOHN B. BRADSHAW.

On this 28th day of May personally appeared before me, notary public for the State of Maryland, Thomas C. Chappell, defendant and appellant in the above-entitled cause, and made oath on the Holy Evangely of Almighty God that the appeal of the said cause from the court of appeals for the State of Maryland to the Supreme Court of the United States is not taken for the purpose of delay.

THOMAS C. CHAPPELL.

Subscribed and sworn to before me this first day of June, A. D. 1888.

[NOTARY'S SEAL.] FELIX R. SULLIVAN,
Notary Public.

Endorsed on cover: Maryland court of appeals. No. 1037. Thomas C. Chappell, plaintiff in error, *vs.* John B. Bradshaw. Filed July 13th, 1888.

IN THE

Supreme Court of the United States.

THOMAS C CHAPPELL,
Plaintiff in Error,

vs

JOHN B. BRADSHAW,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR UPON MOTION TO DISMISS AND AFFIRM.

WM. A. FISHER,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States

Error to the Court of Appeals of Maryland.

THOMAS C. CHAPPELL,

Plaintiff in Error,

vs.

JOHN B. BRADSHAW,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR UPON MOTION TO DISMISS AND AFFIRM.

The defendant in error asks the Court to either dismiss the writ of error in this cause for want of jurisdiction, or to affirm the judgment of the Court of Appeals of Maryland, with ten per cent. damages, under Rule 23 of this Court, on the ground that it is manifest that the writ of error mentioned was sued out frivolously and merely for delay. The Court cannot, of course, do both. If there is nothing in the Record to confer jurisdiction upon it, it has no authority to affirm the judgment of the State Court; nor could it, in dismissing the writ, impose the punitive damages accorded by its Rule 23, we contend. If it has no jurisdiction to entertain the matters brought up by the Record, it is hard to see where it is to find its jurisdiction for mulcting the

plaintiff in error for attempting to present these matters to its attention. Even prior to the adoption of Rule 24, section 1, by this Court, costs were not allowed to a defendant in error on dismissal of the writ for want of jurisdiction.

Inglee vs. Coolidge, 2 Wheat. 363.

I. Should the writ of error in this cause be dismissed on this motion for want of jurisdiction in this Court? To the proper determination of this question, the calculating but unwarranted attempt of the defendant in error to inject into the Record in this cause, by way of estoppel, the Record of a cause in a lower federal Court, is plainly impertinent.

"Want of jurisdiction and irregularity of the writ," said Ch. J. Taney, in Hecker vs. Fowler, 1 Black, 95, where there was a motion to dismiss and affirm, "are the only grounds for dismissal." See to the same effect—

The Eutaw, 12 Wall. 136.

See also—Curtis' Jurisdiction of the U. S Courts, p. 61.

From the Record it appears, by clear and necessary intendment, that a right conferred upon the plaintiff in error by a statute of the United States, was drawn in question in the State Court, and that to have induced its judgment, this right must have been passed upon adversely to the plaintiff in error.

This is all that is necessary to give this Court jurisdiction.

"It is sufficient," said J. Story in the leading case of Crowell vs. Randell, 10 Pet. 397, construing section 25 ot the Judiciary Act, "if it appears by *clear and necessary intendment*, that the question must have been decided in order to have induced the judgment."

Again, this Court said, in Furman vs. Nichol, 8 Wall. 56: "If the Record shows, either by express averment, *or* by *clear and necessary intendment*, that the constitutional provision did arise, and that the Court below could not have reached the conclusion and judgment it did reach, without

applying it to the case in hand, then the jurisdiction of this Court attaches." See also cases cited by Justice Story in Crowell vs. Randell, and also following cases:

Commercial Bank of Cincinnati vs. Buckingham's Exors., 5 How. 341.
Williams, Trustee, vs. Oliver et al., 12 How. 124.
Christ Church vs. County of Philadelphia, 20 How. 28.
Hamilton Company vs. Massachusetts, 6 Wall. 636.
Boughton vs. Exchange Bank, 104 U. S. 427.

Nor is it necessary to state in terms on the Record that a law of the United States was drawn in question. "It is sufficient to bring the case within the provisions of the 25th section of the Judiciary Act, if the Record show that the constitution, or a law or treaty of the United States, must have been misconstrued, or the decision could not be made." Ch. J. Marshall, in Wilson vs. Blackbird Creek Marsh Co., 2 Pet. 257. See also Furman vs. Nichol, 8 Wall. —.

These decisions would seem to conclusively establish what was meant by section 25 of the Judiciary Act, in providing that the federal right must be "specially set up or claimed." Whether a federal question was passed upon adversely to a plaintiff in error, consciously or unconsciously by a State Court, is immaterial, if it is by clear and necessary intendment of law deducible from the record that it must have been so passed upon to have induced the judgment of the State Court. In other words, if it appears from the record that a State Court ought to have known that it was passing adversely to a plaintiff in error upon a federal question controlling in the cause, it will be held by intendment of law to have known it.

Applying these principles to the Record before us, it tenders a case clearly within the jurisdiction of this Court. The first prayer of the defendant in error, the plaintiff below (Record, p. 6), asked the Circuit Court for Howard

county to instruct the jury that "if the jury shall find from the evidence in the case that the plaintiff's boat was damaged by fire at the time mentioned in the declaration; that the said damage was caused by the negligence of the defendant's agents, then the plaintiff is entitled to recover a verdict, unless the jury believe that the plaintiff or his agents contributed directly to the happening of the accident by their own negligence." This prayer was granted, and the ruling of the Court granting it was duly excepted to by the plaintiff in error, the defendant below (Record, p. 8).

Admitting that at the time this prayer was granted the plaintiff in error was entitled to the benefit of the Acts of Congress limiting the liability of a vessel owner for torts, committed without his privity or knowledge, to the value of his interest in the vessel, this instruction was erroneous and misleading, exercised a controlling effect upon the result of the cause, and denied to the plaintiff in error a right protected by the twenty-fifth section of the Judiciary Act.

The testimony in the defendant's bill of exceptions (Record, p. 4) was to the effect that on or about December 3, 1885, the vessel of the plaintiff (the defendant in error) was anchored in a navigable water of the United States, about two hundred yards from the wharf of the defendant; that the defendant's scow, which was lashed to the wharf, and which was used by the defendant solely for carrying freight of his own, caught on fire from some cause, and while on fire, drifted against the vessel of the plaintiff, and set the latter on fire, inflicting thereby the injury, on account of which the plaintiff sued.

This testimony further shows that when the collision took place the scow must have been in a very advanced state of combustion. The plaintiff simply testified that the scow was then on fire. So, too, the plaintiff's witness, Thomas, simply testified, without reference to time, that the scow was a covered one, and that the house of the scow was on fire; but other features of the testimony leave little doubt on the subject. The fact that the scow was purposely cut

adrift by an employee of the defendant at the instance of a watchman of the defendant; the fact that she was laden with twenty-five carboys of nitric acid, evidenced to be an inflammable substance, and some old furniture; the fact that she had to drift in a burning condition, with a high wind fanning her, for two hundred yards, or nearly as much, before she could reach the vessel ignited by her; and the fact that the latter was so injured by contact with the former, when she was reached, that, even after expensive repairs had been effected upon her, she was not worth more than half what she was at the time of the collision, are all circumstances tending strongly to show that, even when the scow was cut adrift, the flames had encroached upon the scow too much to leave any hope of checking them, and that by the time the scow had drifted the two hundred yards or less must have exercised a high degree of destructive energy. On the other hand, there is not a word of testimony in the Record to show that any attempt whatever was made to extinguish the burning scow, or that the scow was not in the ordinary course of nature totally consumed.

From these circumstances the jury could not but have inferred, or might well have inferred, that the scow was absolutely destroyed, and in this event, it further appearing from the testimony that there was no freight pending, the liability of the plaintiff in error was entirely extinguished.

Norwich Company vs. Wright, 13 Wall., 127.

The instruction of the Circuit Court for Howard county, therefore, upon this state of facts, was plainly erroneous and misleading in directing the jury generally that, in case they found that the casualty was due to the negligence of the defendant's agents, without any contributory negligence upon the part of the plaintiff, the plaintiff was entitled to a verdict; and, if this is so, it is needless to contend that the error of the Court exercised a controlling effect upon the cause.

In this connection, Lane, admx., vs. Lantz, 27 Md., 217, is a case closely in point. This was an action for the breach

of a warranty. The testimony showed that a horse, warranted to be sound, was affected, at the time of the sale, with a disease, of which he died in a few days afterwards. There was no direct proof offered to show what her actual value was at the time of the sale. "From this evidence," said the Court, "the jury might well have found that she was valueless when sold, and therefore the measure of damages to be recovered by the plaintiff would be the price paid without any abatement or deduction." Can it be argued that the decision of the Court would have been different if the testimony in this case, instead of showing that the horse died in a few days after the sale, had shown that, at the time of the sale, the horse was suffering from a disease that terminates fatally in a few days. And is not the inference, from the progressive nature of fire, that an inflammable substance in flames was in the ordinary course of combustion destroyed, even more clearly deducible than the inference from such a disease that vital existence was quenched within the few days?

Even then, if, in order to avail himself of the limitation upon his liability as a vessel owner, allowed him by federal law, the burden was upon the defendant to show the value of his scow after the collision, Norwich Co. vs. Wright, 13 Wall. 126-127, and consequently, to furnish the jury with a basis for the estimation of the restricted damages payable by him, the defendant's own witnesses relieved him of this burden by testifying to facts from which, in the absence of opposing testimony, it appeared that the value of the scow, whatever it was, was annihilated.

The above reasoning is predicated upon the assumption that the plaintiff in error, as the owner of a scow, was entitled, when the instruction in question was granted, to wit: on or about Sept. 22nd., 1887, (Record, p. 13) to the limitation of liability accorded to vessel owners by the Act of Congress of March 3rd., 1851. That he was, we believe to be clear.

The Act just mentioned expressly excepted the owners of canal boats, *barges or lighters*, and all vessels of every description whatsoever, used in rivers or inland navigation, from

the benefit of its provisions, limiting the liability of a vessel owner for the torts of his agents specified in the Act, to the value of his interest in the vessel and the freight pending. The provisions of this Act were codified in the Revised Statutes, sections 4282-4289. The portion excepting canal boats, etc. from the benefit of the limitation of liability is reproduced in section 4289.

If, prior to the month of September, 1887, an Act of Congress was passed and went into operation, repealing section 4289 of the Revised Statutes, the section in which canal boats, etc. were excepted from the benefit of the limitation of liability, but repealing none of the preceding sections from section 4282 (inclusive), then the effect of the repeal was to admit the defendant below, as the owner of the scow in this cause, to the benefit of the limitation contained in the preceding sections. Sections 4282 etc. of the Revised Statutes declare that the owners of vessels shall be entitled to the limitation of liability. The word *vessel* embraces a scow, Congress having provided in section 3 of the Revised Statutes that "the word 'vessel' includes every description of water craft, or other artificial contrivance used, or capable of being used, as a means of transportation on water."

Such an Act of Congress was the Act of 1884, sess. 1, ch. 121, secs. 18 and 30, approved June 26th, 1884, and, consequently, approved even before the collision in this cause occurred. (Record, page 4). The intent of sec. 18 was manifestly to *re-enact* the rule of limited liability, contained in the Act of 1851, in clearer and more comprehensive terms, so as to include "debts" *as well as liabilities for the torts specified in the Act of* 1851, and all other possible liabilities, whether arising *ex contractu* or *ex delicto.* The broad words that "the individual liability of a ship owner shall be limited to the proportion of *any or all debts and liabilities* that his individual share of the *vessel* bears to the whole, and the aggregate liabilities of all *the owners of a vessel on account of the same* shall not exceed the value of such *vessels* and freight pending," makes this clear. The word "debts" covers all causes of action arising *ex contractu;* and, if the purpose of sec. 18, of the Act of 1884,

had simply been to extend the benefit of the limitation, contained in the Act of 1851, to causes of action arising *ex contractu*, there would have been no occasion to use such latitudinous language as *any or all debts and liabilities*. Nor can it be contended that the only other object of sec. 18, of the Act of 1884, was to declare that, where there were several part owners of a vessel, with varying degrees of interest in the vessel, each should be liable not *in solido* to the extent of the value of the aggregate interests in the vessel and freight pending, but only to the extent of the value of his individual interest. This had, perhaps, already been provided by section 4283, of the Revised Statutes.

But, if this was not the case, why, if it was not the paramount intention of Congress to re-enact the limitation of liability in the general and comprehensive form that we claim, should Congress have employed the language "*and the aggregate liabilities of all the owners of a vessel on account of the same* (any or all debts or liabilities), *shall not exceed the value of such vessels and freight pending.*"

Whatever new principle the words "the individual liability of a ship owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the *vessel* bears to the whole," which immediately precede these last words, may have introduced into the federal law, these last words can by no conceivable ingenuity be distorted into anything but a re-enactment in general terms, that includes debts as well as torts, of the limitation of liability contained in the Act of 1851, and that was there applicable to torts alone. Section 30, of the Act of 1884, provides that "all laws and parts of laws in conflict with the provisions of this Act (the Act of 1884), are hereby repealed."

Placing the terms of this last section of the Act of 1884, as well as those of section 18, side by side with sections 4282-4289 (both inclusive), of the Revised Statutes, it is hard to see upon what canon of construction the effect is to be withheld from the two of repealing section 4289, of the Revised Statutes. When a posterior law is repugnant to a

prior law, it repeals it *in toto*. When it is only partially so repugnant, the repeal extends only so far as the repugnancy extends. These results follow by necessary implication, even when there is not a word in the posterior law expressive of an intention to repeal.

In section 30 of the Act of 1884, Congress, impatient of the accusation of inadvertence that is sometimes imputed to a legislative body when a repeal results by implication, explicitly asserted that all laws and parts of laws in conflict with the provisions of the various sections of the Act were thereby repealed, thus justifying the inference that Congress in passing the Act recognized that there *were* laws and parts of laws in conflict with its various sections, among which it is fair to infer that it considered section 4289 of the Revised Statutes to be one. But, putting this aside, what is the result of the comparison suggested, in the light of the principles of construction stated? It is to disclose entire harmony between section 18 of the Act of 1884 and all the sections of the Revised Statutes from 4282 to 4289, exclusive, but a direct and fundamental repugnancy between section 18 of the Act of 1884 and section 4289 of the Revised Statutes. With the seven sections preceding section 4289 of the Revised Statutes, section 18 of the Act of 1884 can, without the least difficulty, be construed so as to constitute with them one harmonious and homogeneous whole. It is simply the re-enactment in general and clearer terms, although with a more enlarged scope, of the limitation of liability which they, or all of them but section 4288 (which is, really, but slightly relevant to the rule of limited liability at all), provide for in detail.

For this very reason, as well as for the reason that prior to 1884 the Supreme Court had by its supplementary rules in admiralty under the Act of 1851, and decisions, evoked a complete system of procedure from the Act of 1851, it probably was, that section 18 of the Act of 1851 was such a brief enactment. But this compatibility wholly ceases when the comparison is extended to section 4289 of the Revised Statutes. *Nothing can be more invincibly repugnant to a general*

rule than the exceptions to its operation enacted along with it, and, consequently, we can see no escape from the conclusion that if the intention of Congress in enacting section 18 of the Act of 1884 was to re-enact in general and clearer terms, although with a more enlarged scope, the limitation of liability contained in the seven sections of the Revised Statutes preceding section 4289, then, by so enacting it, without re-enacting the exceptions contained in section 4289, it manifested, according to the plainest principles of judicial construction, a further intention to repeal section 4289. This intention is clearly deducible from the face of the legislative record, and it is only when there is a failure of all intrinsic aids to construction that Courts should grope *aliunde* for the intent of Congress.

It is upon the above train of reasoning that the plaintiff in error relies, as far as sections 18 and 30, of the Act of 1884, are concerned, to sustain his claim to the limitation. Succinctly stated, the proposition would be: Sections 18 and 30, of the Act of 1884, by repealing section 4289, of the Revised Statutes, abrogated the only section of the Revised Statutes, from section 4282 to 4289 (both inclusive), that excludes the owner of a scow from the benefit of the limitation created by the Act of 1851.

If the above train of reasoning is just, and the effect of sections 18 and 30, of the Act of 1884, was to repeal section 4289, of the Revised Statutes, this effect could not in any way be prejudiced by a subsequent enactment of Congress treating or recognizing Section 4289, of the Revised Statutes, as if it were still in existence.

The Act of Congress of 1886, U. S. Statutes at large, session 1, chapter 421, section 4, may have been passed merely as a declaratory statute for the purpose of removing the last doubt as to the effect of sections 18 and 30, of the Act of 1884, in repealing section 4289, of the Revised Statutes, by itself repealing, in express terms, what had already been repealed by necessary implication. But, should the Court take a different view, we submit that it is not for the federal legislature, but for the federal judiciary

to construe the effect of subsequent statutes upon former. The intent of one Congress is not to be deduced from the declarations of another. If Congress is not only to pass laws, but to pass upon their effect afterwards, the fundamental distinction between the legislative and judicial departments of government is effaced. This assumption of a prerogative that does not belong to it was, in a notable instance, properly rebuked by the Supreme Court.

United States vs. Claiflin, 97 U. S., 548.

Before passing from the Act of 1884, we will further say that throughout section 18, of the Act of 1884, the word *ship-owner*, occurring in the first and last clauses of the section, is so repeatedly limited by the word *vessel*, as to entirely disentitle to consideration the inference attempted to be drawn by the defendant in error in this connection. The interchangeable use, in the same section, of the word "ship-owner" and the words "owners of a vessel" adds, it seems to us, to this conclusion all the remaining force that is needed.

If sections 18 and 30, of the Act of 1884, did not repeal section 4289, of of the Revised Statutes, section 4, of the Act of 1886 did. This section provides "that section 4289, of the Revised Statutes, be amended so as to read as follows: Section 4289. The provisions of the seven preceding sections, and of section 18 of an Act entitled "An Act to remove certain burdens on the American merchant marine and encourage the foreign carrying trade, and for other purposes," approved June 26th, 1884, relating to the limitations of the liability of the *owners of vessels* shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers, or in inland navigation, including canal boats, barges and lighters." The Act was approved June 19, 1886.

The rule is clear that where a preceding law is amended by a subseqent one, "so as to read as follows," the preceding one is repealed so far as its provisions are not reproduced in the subsequent one.

State vs. Andrews, 20 Tex. 230.
State vs. Ingersoll, 17 Wisc. 631.

Consequently, as all the provisions of section 4289 of the Revised Statutes were dropped in section 4 of the Act of 1886, the latter operated as a repeal of the former. The effect of a repeal is, in the language of Ch. J. Tindal, in Key vs. Goodman, 4 Moore & Payne, 341, "to obliterate the statute repealed as completely from the records of Parliament as if it had never passed, and *that it must be considered as a law that never existed*, except for the purpose of those actions or suits which were commenced, prosecuted *and concluded* while it was an existing law." That the principle here announced is a principle of universal application, applying to every kind of law repealed, civil as well as criminal, is abundantly demonstrated by the following cases:

Surtees vs. Ellison, 8 B. & C. 752, (Lord Tenterden, Ch. J.)
Maggs vs. Hunt, 4 Bing. 212.
Miller's Case, 1 W. Bl. 451.
Rex vs. Justices of London, 3 Burr. 1456.
Butter vs. Palmer, 1 Hill, 324 and 329.
Commonwealth vs. Obed Marshall et al., 11 Pick. 350.
Yeaton vs. U. S., 5 Cranch, 281.
Schooner Rachel vs. U. S., 6 Cranch, 329.
Commonwealth vs. Duane, 1 Brun. 601, 608.
Stoever vs. Immell, 1 Watts. 258.
Williams vs. Co. Commissioners, 35 Me. 345.
Hampton vs. Commonwealth, 7 Han. (Penn.) 329.

The only qualification upon this rule in the United States, is that the effect of the repeal must not be to divest a vested right originating in the law repealed. This qualification results from limitations in the federal constitution, which are applicable, respectively, to the States and Congress.

Nor is the rule, as the defendant in error seems to think, in the slightest degree dependent upon the equally well settled rule that no retrospective effect shall be accorded to a law unless it is expressly, or by necessary implication, pro-

vided therein that the law shall have such effect. This last rule is applicable only to positive enactments which are not passed for the purpose of repealing prior laws. The retroactive effect of a repealing statute, in repealing the exceptions in a prior statute to a general rule that it does not repeal, and which by the repeal of the exceptions becomes applicable to the persons or things excepted, *is not due to the fact that the repealing statute retroacts upon the person or things excepted, so as to bring them within the general rule, but to the fact that it annuls the part of the prior law that renders them exceptions to the general rule.*

In the case of another than a repealing statute, the rule of construction is that the enactment has no such retrospective operation unless such retrospective operation is expressly, or by necessary implication, reserved in the enactment.

In the case of a repealing statute, the rule of construction, as the cases last cited show, is that, unless all the consequences flowing from the repealing statute other than vested rights, among which of course, are the rights, involved in judicial proceedings, *prosecuted to a final termination*, prior to the repeal, are to be wiped out of existence, there must be a reservation either in express words or by necessary implication to this end in the repealing statute. Constitutional limitations with respect to vested rights apply, of course, to all statutes, whether repealing or otherwise. The distinction above contended for was pointedly recognized in Butler vs Palmer, 1 Hill., 324.

Applying the above principles to this cause, upon what ground is it to be claimed that the enactment of section 4 of the Act of 1886 did not have the effect of abrogating the exceptions contained in section 4289 of the Revised Statutes (among which scows were one) and of admitting the plaintiff in error at the trial below to the benefit of the limitation in the Act of 1851 which was, from the time of the repeal, as completely extended to scows as *if the exceptions contained in section 4289 had never existed?*

The judgment obtained by the defendant in error against him was not secured until December 6th, 1887, (Record, p. 3) more than a year after the Act of 1886 went into effect, and therefore more than a year after scows had ceased to be excepted from the terms of the Act of 1851, if the Act of 1884 did not sooner produce the same result.

The Act of 1884, chapter 4, divested no vested right of the defendant in error. It simply substituted one measure of damages for another measure of damages.

Re Long Island &c. Transportation Co., 5 Fed. Rep., 611-613.

That Congress and the State Legislatures have the power, even in the case of vested rights, so long as they do not destroy or substantially destroy the right, to change by repealing statutes or otherwise, the remedy at will, is a firmly established proposition.

Cooley Cons. Lims. 443 (361).

But it is hard to see in what sense a plaintiff, who has not established his right to any damages at all, can be said to have a vested right to a certain measure of damages.

Under this head it only remains to say that the plaintiff in error undoubtedly had a right to rely in the State Court upon the limitation contained in the Act of 1851, provided that this limitation was applicable to a scow. In the Scotland, 105 U. S., 33–34, this Court declared "once for all" that its rules adopted in December term, 1871, "were not intended to restrict parties claiming the benefit of the law, but to aid them. Some form of proceedings was necessary to enable ship owners to *bring into concourse* the various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo, where they were entitled or conceived themselves to be entitled to the law of limited responsibility, and where they were subjected or liable to actions for damages at the suit of the parties thus injured. The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to ship

owners in such a case. *They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt. They were not intended to prevent a defense by way of answer to a libel or plea to an action if the ship owners should deem such a mode of pleading adequate to their protection.*"

In the present cause there was no necessity for bringing various parties "into concourse," the defendant in error being the only party who could claim damages, and the limitation, if allowed in it, would have been "adequate to the protection" of the plaintiff in error.

II. Admitting that this cause is within the jurisdiction of this Court, should the judgment below be affirmed, with ten per cent. damages? Unless the defendant in error has some color of right to a dismissal for want of jurisdiction—(Whitney vs. Cook, 99 U. S., 607; Hinckley vs. Morton, 103 U. S., 765)—this Court will not affirm the judgment below, unless it is manifest that the writ of error was taken for delay merely, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

That the defendant in error has no color of right to a dismissal for want of jurisdiction in this Court, and that the question on which the jurisdiction of this Court depends is not so frivolous as not to need further argument sufficiently appears, we think, from what we have heretofore said. And where, we may ask, is there any evidence in the Record or the proceedings of this Court, that the writ of error in this cause was sued out merely for delay, in which event alone, this Court will award ten per cent. damages?

Little vs. Herndon, 10 Wall., 26.

Certainly not, for any lack of gravity in the right asserted here against a judgment for $1,500 and accumulated interest, when the plaintiff in error believes that he has been exonerated from any responsibility whatever by the supreme law of the land. Certainly not from any want of

diligence in the prosecution of that right, a circumstance that has been controlling in almost every case in which this Court has awarded ten per cent. damages upon a motion to dismiss and affirm. Desty's Federal Procedure, page 665—and cases there cited. On the contrary, the very zeal with which it is prosecuted is commented upon by the defendant in error in his brief.

Nor is the defendant, for the purpose of showing that the writ of error in this cause was sued out merely for delay, any more authorized to obtrude the record of a cause in a lower Federal Court upon the notice of this Court than he was to do the same thing for the purpose of securing a dismissal of the writ. Even if we were disposed to waive the extraordinary attempt to plead the judgment of a lower Court by way of estoppel to the regular course of appellate procedure upon a record, to which such judgment is absolutely unknown, we might well ask whether, when a federal question is brought here by writ of error from a State Court, upon the right to appeal from the judgment of which Congress has placed no pecuniary limit whatever, this Court will decline to entertain the question, because the same question has been passed upon in a proceeding *in rem* in admiralty in a Court, upon the right to appeal from the judgment of which the plaintiff in error in the former case was debarred by such a pecuniary limit. But such a query cannot even be considered by this Court. In not one of the many cases in which this Court has entertained motions to dismiss and affirm, with ten per cent. damages, has it ever sanctioned the practice of introducing testimony dehors the record for the purpose of establishing that its appellate process has been invoked merely for delay. In one case it distinctly decided that such testimony could not be introduced for the purpose of increasing ordinary damages.

Cotton vs. Wallace, 3 Dall., 302.

Where would such a practice end, if allowed? If a judgment dehors a record here can be introduced upon a motion to dismiss and affirm for the purpose of showing that a

writ of error was sued out merely for delay, why not allow the defendant in error to prove by admissions of the plaintiff in error in the course of conversation or other matters *in pais* that such was the case. Such testimony is wholly foreign to the nature of appellate procedure, and wholly unsanctioned by precedent. Indeed, it was probably offered by the defendant in error upon the principle of the equity practitioner who elicits testimony that he knows to be plainly inadmissible, but that he hopes will, nevertheless, "have its effect upon the judge," because it has to be read before its admissibility can be passed upon.

WM. A. FISHER,

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
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CLERK.

IN THE

Supreme Court of the United States.

THOMAS C. CHAPPELL,

Plaintiff in Error,

vs.

JOHN B. BRADSHAW,

Defendant in Error.

ARGUMENT OF PLAINTIFF IN ERROR UPON MOTION TO DISMISS AND AFFIRM.

IN THE

Supreme Court of the United States

Error to the Court of Appeals of Maryland.

THOMAS C. CHAPPELL,

Plaintiff in Error,

vs.

JOHN B. BRADSHAW,

Defendant in Error,

ARGUMENT OF PLAINTIFF IN ERROR UPON MOTION TO DISMISS AND AFFIRM.

The declaration discloses the cause to be upon waters of the United States where the influence of the tide is felt. "*The act of 1789 gives the entire Constitutional power to determine all civil causes of Admiralty and Maritime Jurisdiction, leaving the Courts to ascertain its limits as cases may arise—— as the rule is, locality gives Jurisdiction in collision, and that it exists if the influence of the tide is at all felt.*"

Waring vs. Clarke 5th How 466 per Catron J. The plaintiff, now defendant in error in order to show his right to a Common law remedy, within the saving clause of the 9th section

of the Judiciary Act must show the Cause to be one where the common law is competent to give a remedy as it stood in 1789.

"*The expression "saving and reserving to suitors in all Cases a Common law remedy where the Common law is competent to give it "as used in the Statutes of the United States, is to be understood in the sense in which these words were understood in 1789 when the Statute was first enacted.*" Henry on Admiralty page 4.

"*This Jurisdiction as far as it concerns torts depends entirely upon the locality.*" Henry on Admiralty, chapter 11th; page 68; section 26 and cases there cited. "*The Jurisdiction of the Admiralty is not affected by the Citizenship of the parties or their residence under the Act of 1789.*" Henry on Admiralty, page 92; section 33. To maintain the right of procedure by an action in personam it is incumbent on the plaintiff, now defendant in error to show on the record that the Cause is one in which the Common law could give a remedy, as it stood at the time of the passage of the Judiciary Act of 1789 within the saving Clause. There is no averment to this effect in the declaration; according to the law of the State the verdict does not cure this omission. "*The omission of a Jurisdictional averment is not cured by the verdict.*" Poe Pleading and Practice at Law, vol. 1st; page 883.

The general issue plea in torts denies the plaintiffs right. "*Scope of this plea in tort. Ordinarily in action for torts the plea, "that the defendant did not commit the wrong alleged," puts everything in issue. It operates to deny the plaintiffs statement of his right, the defendants invasion of that right, and the damages, and puts the onus upon the plaintiff of proving his entire Case.*" Poe Practice and Pleading at Law, page 712.

"*By the Maritime law the vessel doing the injury is liable in rem for the tort; this is the right, and the remedy must be found somewhere,*" per Catron J. Waring vs. Clark 5th, Howard 467. By the denial of the plaintiffs right of procedure by action in personam by the general issue plea, and further by the excep-

tion duly taken in the lower Court to the granting by the Court of the plaintiffs first prayer to the effect that the plaintiff had a right to recover, there is by necessary intendment of law, "*drawn in question*" the 2nd section; 3rd Article of the Constitution of the United States and the 9th section of the Judiciary Act.

There is a denial of the plaintiffs rights to proceed to personam, and to recover in a Cause which by reason of its locality is only within a proceeding in rem, and since such proceeding under the 2nd Clause, 3rd Article of Constitution can only be had in Courts of the United States, there is a right, privilege and immunity specially claimed, and the decision against that right. It is not necessary under section 709 of the Revised Statutes to set up the Statute; to claim the right, privilege or immunity is sufficient by the express language of that section; the language is alternative; the right, privilege or immunity may be either specially set up or claimed. In some cases it is only necessary that "*the validity of a Statute or an authority exercised under the United States* is drawn in question and the decision is against their validity, "*or that an authority exercised under a State or a Statute of State is drawn in question on the ground that it is repugnant to Constitution or Laws of the United States, and the decision is in favor of the validity of the authority exercised under the State or the State Statute.* The doctrine is clearly laid down in the Case of Martin vs. Hunter, Lessee 1st Wheat 334 per Story J, that if it appears from the record that the Cause is within any of the Class of Cases enumerated in the 2nd Clause, 3rd Article of the Constitution to which the word "*shall*" is applied, the Court will exercise Jurisdiction and the Court in this Case specially calls attention to the fact that the Judiciary Act employs the words, "*drawn in question.*"

There is no averment, no evidence to show the locality in which the cause arises to be in the body of a County or within the Jurisdictional limits of the County where the suit was instituted or tried, or within the body of any County of the State. In speaking of the right of procedure in rem

"*The Supreme Court of the United States treats the right to processes, a question of procedure, and not of Jurisdiction, Henry on Admiralty, page 24-25, section 15th,*" this must also be true of the right of procedure by action in personam. But the right to a Common Law remedy must involve the question of locality, since the remedy is only saved in cases where the Common Law as it stood in 1789 when the Judiciary Act passed could give it, and in cases of tort locality defines the line between Admiralty and Common Law Jurisdiction. This doctrine is fully laid down in Waring vs. Clark, 5th Howard 454, and it was fully determined in that case, that at the time the Judiciary Act was passed the Common law Jurisdiction did not extend to tide waters, in tort, and in that case, arising in the Mississipppi River, near its mouth, within the influence of the tide the right to a Common law remedy and trial by Jury was denied.

The rule is "*That locality is the true test of Admiralty cognizance in all cases of Maritime* ~~Torts~~" The Commerce Waring vs. Clarke 5th, Howard 441, The Commerce 1st, Black 574, Fretz vs. Bull 12th, Howard 466 In the case of Waring vs. Clarke, the Court laid down the doctrine that all cases upon tide waters are cases exclusively within admiralty. But this Court has held that the saving Clause of the 9th section of the Judiciary Act, did not reserve Jurisdiction to Common law Courts.

"*The Case before us is not within the Saving Clause of the 9th section. That Clause only saves to suitors the right of a Common law remedy where the Common law is competent to give it. It is not a remedy in the Common law Courts which is saved, but a Common law remedy.*" The Moses Taylor 4th, Wallace 431 per Feild J. This definition of the saving Clause settles the question of State Jurisdiction under the saving Clause. The Court says: "*It is not a remedy in Common law Courts which is saved, but a Common law remedy.*" The law is clearly laid down in the Revised Statutes, section

711. *"The Jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the Courts of the several States.*

1st—Of all crimes and offences cognizable under the authority of the United States.

2nd—Of all suits for penalties and forfeitures incurred under the laws of the United States.

3rd—Of all civil Causes of admiralty and maritime Jurisdiction, saving to suitors in all cases the right of a Common law remedy where the Common law is competent to give it." The Jurisdiction is exclusive, since under the doctrine laid down in Waring vs. Clarke, 5th Howard 441, the procedure is dependent on the locality, and in such causes as were cognizable in State Courts of admiralty at the time the Constitution was adopted, the proceeding must continue to be in admiralty.

The locality of this cause *"off Hawkins' Point in the Patapsco River"* (Record page 2) is not within the limits of Baltimore County where the suit was brought, and is not in the body of any county of the State of Maryland.

The omission of a jurisdictional averment is fatal to the action. The exception taken by the defendant now plaintiff in error and duly signed by the lower Court to the ruling of the Circuit Court for Howard County in granting the first prayer of plaintiff now defendant in error (record page 6th) denies the validity of the right of the plaintiff now defendant in error to recover upon the pleading and evidence. It brings the entire record before the appellate Court.

The validity of the right of plaintiff now defendant in error is denied, and every element of that right is denied. Every reason of law urgable against the validity of the right is drawn in question, and every fact in the evidence.

The 2d, 3d and 4th counts in the narr declare: "said scow being carried by wind and *tide* into contact with plaintiff's

vessel" (Record pp. 2 and 3), and thus discloses a cause cognizable under the rule laid down in Waring vs. Clarke, 5 Howard, 441, only by a proceeding in rem in a Court of Admiralty. The doctrine laid down in that case excludes all causes where the influence of the tide is felt, from the saving clause of the Judiciary Act. There is "*drawn in question directly on the record an authority exercised under a State on the ground of its being repugnant to the Constitution of the United States.*"

In the case of the Commerce, the Court held "*that the judicial power in all cases of admiralty and maritime jurisdiction was conferred by the Constitution; that locality is the true test of admiralty cognizance in all cases of maritime torts.*" The Commerce per Story J., 1 Black, 578, Sec. 1836, of the Revised Statutes requires every executive and judicial officer of a State to support the Constitution of the United States. "*Why does a Judge swear to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule for his government?*" Marbury vs. Madison, 1 Cranch, 137, per Chief Justice Marshall.

"*The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.*" Gibbons vs. Ogden, 9, Wheat. 1. Per Chief Justice Marshall. "It is manifest that the Judicial power of the United States is unavoidably in some cases, exclusive of all State authority; and in all others may be made so at the election of Congress. No part of the criminal Jurisdiction of the United States can consistently with the Constitution be delegated to State Tribunal. The Admiralty and Maritime Jurisdiction are of the same exclusive cognizance." Martin vs. Hunter's Lessee 1st, Wheat 337. Per Story J. "The original or appellate Jurisdiction ought not therefore to be restrained, but should be commensurate with the mischief intended to be remedied, and of course should extend to all cases. "Martin vs. Hunter's Lessee 1, Wheat. 335. Per Story J. Congress cannot vest any portion of the Judicial power of the United States, except in Courts established by

itself." Martin vs. Hunter's Lessee 1, Wheat. 330. Per Story J. This cause arises directly in the Constitution and Laws of the United States, and the doctrine is fully laid down in the case of Martin vs. Hunter's Lessee, that the Jurisdiction of the Supreme Court of the United States is conferred by the Constitution of the United States, and is paramount to the section of the Judiciary Act, codified in section 709, Revised Statutes.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law," XIV Article, amendments to Constitution United States.

It is evident from the record that the State Court could not have induced a verdict in this cause, which is a maritime cause, and exclusively within admiralty without exercising an authority repugnant to the Constitution of the United States.

The exception to the ruling of the lower Court denies the right of plaintiff, now defendent in error to recover and specially sets up and claims a right, privilege and immunity under the acts of Congress, July 18th 1866, and June 29th, 1870, Codified in section 3, Revised Statutes declaring the meaning of the word vessel which defines the Statute Georgii II Septimo and A. D. 1733, in force in Maryland. Alexander British Statutes in force in Maryland 722. If this Court considers the record of the Circuit Court of the United States, in a separate proceeding filed as an exhibit, by Counsel for defendent in error, it will observe page 21 "The facts admitted are these. The lighter became a total loss, and is valueless." The Circuit Court did not extend its attention to the British Statutes in force in the State, defined by section 3, of Revised Statutes. The Court will observe that the decision of the Circuit is erroneous in excluding by constructions from the act of 1884, Water Craft embraced in its language. The act of 1884, applys by its language to vessels generally, section 3 of Revised

Statutes, declares the word vessel includes every description of water craft or other artificial contrivance used or capable of being used on water. "If the power reside in Congress as a portion of the general grant to regulate Commerce, then the acts applying that power to vessels generally must be constructed as comprehending all vessels. If none appear to be excluded by the language of the act none can be excluded by construction," Gibbons vs. Ogden, 9 Wheat, 1 per Chief Justice Marshall.

The act of 1884 cannot be restricted by section 4289, Revised Statutes. Congress has provided just the contrary, section 5601, Revised Statutes. "The enactment of the said revision is not to affect or repeal any act of Congress passed since the 1st day of December, 1873, and all acts passed since that date are to have the full effect; as if passed after the enactment of this revision, and so far as such acts vary from or conflict with any provision contained in said revision; they are to have the effect as subsequent statutes, and as repealing any portion of the revision, inconsistent therewith." It is contended that if section 4289 is repealed by the act of 1884, there was no necessity for passing the act of 1886, amending section 4289, "so as to read," to this effect, the reason for passing the act of 1886 is found in the preface of the Revised Statutes, which states that the provisions of the Revised Statutes, although repealed must continue to appear until altered by special amendatory Statutes. The act of 1886 is merely to amend the section 4289, "so as to read," in conformity with the law; as it has existed since July 1st, 1884, under the act of 1884, which went into effect nearly two years prior to the date of this tort.

"Every Constitutional Act of Congress is passed by the will of the people of the United States, expressed through their representatives in the subject matter of the enactment, and when so passed it becomes the Supreme law of the land and operates by its force on the subject matter in whatever State or Territory it may happen to be." Pollard's Lessee vs. Hagan 3, Howard 224, per McKinley J. Stockton vs.

N. Y. & Balto. R. R., 32 Fed., Rep. 9, Bradley J. The opinion of the Circuit Court of the United States directly at variance with section 3, and section 5601, Revised Statutes does not conclude this Court. The question of procedure in personam in a tort on tide waters has not been adjudicated by the Circuit Court of the United States. neither has this cause been heard on its merits on the evidence in a Federal Court. The right specially set up and claimed by the operation of Sec. 3 of the Revised Statutes on the British Statutes still remains to be considered. This Court has laid down the doctrine that local laws in admiralty will be enforced in the Courts of the United States. Any irregularity in proceedings by defect or want of form may be corrected under Sec. [redacted] Revised Statutes in Courts of the United States. This cause presents questions of the greatest importance in the polity of the United States.

Filed under Section 747 Revised Statutes.

~~See also brief of Counsel for plaintiff in error.~~

Thomas G Shepherd
Plaintiff in error

IN THE

Supreme Court of the United States

Error to the Court of Appeals of Maryland.

THOMAS C. CHAPPELL,

Plaintiff in Error,

vs.

JOHN B. BRADSHAW,

Defendant in Error.

The defendant in error moves the Court:

1st. To dismiss the writ of error in this cause for want of jurisdiction.

2d. To affirm the judgment of the Court of Appeals of Maryland, with ten per cent. damages, because it is manifest that the appeal is frivolous and merely taken for delay.

B. HOWARD HAMAN,

WILLIAM A. HAMMOND,

Attorneys for Bradshaw.

STATEMENT.

This was an action on the case brought by Bradshaw against Chappell in the Circuit Court for Baltimore County, (a Court of original common law jurisdiction) to recover damages for the burning of plaintiff's vessel, while she was at anchor in a cove off Hawkins' Point in the Patapsco river, on the night of December 3, 1885, said fire having been communicated to the schooner through the negligence of Chappell's servants in cutting loose from his wharf a burning scow or lighter, and allowing the same to drift against plaintiff's schooner. The case was tried on the single plea of not guilty, the only defences presented being: (1) No negligence on the part of defendant's servants; and (2) contributory negligence on the part of the plaintiff in not keeping a lookout. This last point was presented as matter of law by the defendant's second prayer, and upon its rejection by the Court, and the rendition of a verdict and judgment for $1,500, the defendant appealed to the Court of Appeals, where the only question presented, either by the *record*, on the *briefs* or in *argument*, was the correctness of the ruling below in rejecting the defence of contributory negligence as matter of law. The judgment was affirmed by the Court of Appeals on the 14th of March, 1888, and so the litigation was supposed to be ended. But on the 27th of March Mr. Chappell filed a motion for a re-argument, in which for the *first time* the idea was presented that by the Act of Congress of 1884, ch. 121, sec. 18, his liability ought to have been limited to the value of the colliding scow, and that although this defence was not presented in any way, and no evidence as to the value of such scow had been introduced, yet the Court below was bound to take notice of this statute, and by its instruction limit the recovery accordingly.

The Court of Appeals overruled this motion, saying, in its opinion, "that this Act of Congress was not before the Circuit Court when the case was tried, nor before this Court on appeal, and that no reference to, or construction of it, was made in either Court." * * * "If the Act of Congress

be applicable to this case (and this is a point which we expressly do not decide) the appellant failed to invoke its provisions at the proper time, and neglected to offer any evidence for the guidance of the jury in ascertaining the value of the scow."

Application was then made to the Hon. R. H. Alvey, Chief Judge of the Court of Appeals, for the allowance of a writ of error to this Court, upon the ground that said Act of 1884 was drawn in question, and upon the further ground, then for the *first time* discovered that "the County Court was in error in exercising jurisdiction by virtue of Sec. 2, Art. 3, of said Constitution, in said suit."

This petition was dismissed without prejudice by Judge Alvey, because "the Act of Congress referred to in the aforegoing petition was not set up or claimed under, nor in any manner relied on by either party to the cause, either in the Court below or in this Court on appeal; and it was not until after the case had been heard and decided by this Court, and the opinion filed, that the Act of Congress was brought to the attention of the Court by a motion for re-argument of the case. That motion was overruled without at all considering whether the Act of Congress could have any application to such case, if the defendant had sought to avail himself of its provisions at the proper time and in the proper manner."

Again it was supposed that the litigation was ended. But not so. For Mr. Chappell, through his proctors, Fisher, Bruce & Fisher, immediately filed his libel in the District Court of the United States for the district of Maryland, in which after reciting the accident and the litigation down to the affirmance of the judgment by the Court of Appeals, he further stated under oath:

5. "And the libellant further alleges that at *no stage of said case from the inception thereof until the final affirmance of the judgment therein as aforesaid*, was the right of the libellant under the Acts of Congress aforesaid to have his liability for the consequences of said collision limited to the value of his interest in said lighter after said collision, either *raised or en-*

tertained, and he is advised that this Court will, notwithstanding said judgment, pass a decree perpetually restraining the said John B. Bradshaw * * * from prosecuting said judgment, and according to the libellant the benefit of the Acts of Congress aforesaid."

A restraining order was issued, and on a motion to strike out this order the Court heard argument upon the single question whether the owner of a lighter was entitled to have his liability limited under the Acts of Congress in force at the time of the accident, or whether Sec. 4289 of the Revised Statutes, excepting the owners of any canal boat, barge or lighter from the benefit of the laws relating to the limitation of liability of shipowners was then still in force. Judge Morris adopted the latter view and dismissed the libel, and upon appeal to the Circuit Court, Judge Bond affirmed this decision. All of which appears by a duly certified record of said proceedings in the Circuit Court, herewith filed and marked Bradshaw's Exhibit A, and from the record of the cause in this Court.

Once more was it supposed that the litigation was ended, but the defendant taking the helm himself, by means of an application first to Justice Bradley, and then, before he had passed upon the question, to Justice Harlan, obtained his writ of error.

ARGUMENT.

To give the Supreme Court jurisdiction to review the judgment of a State Court under Sec. 709 of the Revised Statutes it must appear that some "title, right, privilege or immunity is claimed under the Constitution or any treaty or Statute of * * * the United States, and the decision is against the title, right, privilege or immunity *specially* set up or claimed."

Spies vs. Illinois, 123 U. S. 181.

"The Court must be able to see clearly from the whole record that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Bridge, &c., vs. Hoboken Co., 1 Wall. 116-143.

It is "not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown on the *record* that it did arise and was applied by the State Court to the case."

Per Story J. in Crowell vs. Randell, 10 Pet. 368.

And it must appear that the federal question was actually presented or in some way relied on *before final judgment.*

"We," says Waite C. J., "act on the case as made to the Court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment on a petition for a re-hearing. Such petition is no part of the record on which the judgment rests."

Susquehanna Co. vs. West Branch Co., 110 U. S., 54.
Simmerman vs. Nebraska, 116 U. S., 54.

These authorities would seem to be conclusive of this case in which it appears clearly from the record that the *first reference* to the Acts of Congress was made in the motion for a re-hearing in the Court of Appeals.

II.

But it may be urged that the federal question appears by such clear and necessary intendment that the lower Courts were necessarily required to pass upon it, although the record shows that they did so unconsciously.

Can this be true?

The statute (Sec. 709) provides that the "privilege or immunity" must be "*specially set up or claimed.*"

But aside from this provision, the Act of Congress, if applicable at all, simply furnished an element of defence, limiting, not the right, but the *quantum* of recovery. And upon every principle of pleading, all such matters must be presented either by special plea or by evidence under the general issue, and some appropriate motion to the Court.

Even defences allowed, not as a privilege or immunity to a class, but from considerations of public policy, such as

illegality, must be specially pleaded, whether the defence be made under the common law or by Statute.

7 Wait's Actions and Defences 70, and cases there quoted.

Even the requirements of the Stamp Act, a revenue measure calling most loudly for enforcement in the interest of the Government itself, are held to be waived unless the objection is presented at the proper time.

In Warfield vs. Chaffee, 91 U. S., 690, a most analogous case, the Supreme Court of Louisiana said: "The objection that the note was not stamped, not having been made when it was received in evidence, cannot now be considered." And this Court, in the same case, said: "In the petition * * * for the allowance of this writ, it is stated for the first time in the case that the defendant, Mrs. Warfield, claimed the privilege" of being exempted from obligation on the note because it was not stamped, "and the decision of the Supreme Court denied the claim." "The record sent here from the Supreme Court does not disclose any such claim. The petition for the allowance of the writ in this Court is not part of the record of the Court below. We act only upon that record, and that does not show that any federal question was either presented by the pleadings or upon the trial in the District Court, or decided by the Supreme Court."

III.

Again, it was entirely optional with the defendant whether he would make this defence in the State Court, or whether he would defend there entirely on the merits, and then, his liability being ascertained, apply to the District Court for the legal limitation of it.

The defence on the merits does not preclude him from claiming the benefit of the limitation.

The Benefactor, 103 U. S., 239.
The Scotland, 105 U. S., 24.

In fact, he did so claim it in the District Court, with an averment under oath that the question was not raised in the State Courts. Must he not now be estopped from asserting the contrary here?

IV.

Another claim presented for the *first time* in the petition to Judge Alvey for a writ of error is that "the County Court was in error in exercising jurisdiction by virtue of Sec. 2, Art. 3, of" the Constitution. That is to say, that the exclusive jurisdiction for the recovery of damages for any injury sustained upon navigable water is, by the Constitution, vested in the Federal Courts; and that so much of Sec. 9 of the Judiciary Act of 1789, now embodied in Sec. 563 of the Revised Statutes, as saves "to suitors in all cases the right of a common law remedy where the common law is competent to give it," in civil causes of admiralty and maritime jurisdiction is unconstitutional and void. The novelty of this proposition is only equaled by its boldness, and it can scarcely be necessary to do more than refer to—

Steamboat Co. vs. Chace, 16th Wall, 532, and the cases there cited to show how utterly untenable the contention is.

V.

But even if the point were open, this Court cannot consider it, because, aside from the fact that it is not presented by the *record*, the Statute (Sec. 709) only authorizes this Court to review the judgment of the State Court "where is drawn in question the validity of * * * a Statute of * * * the United States, and the decision is *against*" its "validity."

Here the decision, if affecting the Statute at all, is in *favor* of its validity, because the State Court exercised jurisdiction and granted the very common law remedy reserved to it by the terms of the Statute.

VI.

If, however, the questions had been raised in such manner as to give the Court jurisdiction, it is confidently submitted that the motion to affirm should prevail.

1st. Because the questions endeavored to be presented here are, as between these parties *res adjudicatæ* by the pro-

ceedings in the District and Circuit Courts, before referred to, wherein it has been finally determined by Courts of competent jurisdiction and of last resort, that by the true construction of the Acts of Congress, in force on the 3d day of December, 1885, the plaintiff in error, as owner of a lighter, was not entitled to any limitation of his liability for the damages recovered in this cause. This is really an attempt, under the guise of a writ of error to a State Court, to obtain a review by this Court of a decree of the Circuit Court in a case in which no appeal lies from that Court.

That proceeding was taken by the plaintiff in error in accordance with the rules promulgated by this Court in 13 Wall, XII, and in which "this Court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the Act declared and settled by the definitive decree of a competent Court, which should be binding on all parties interested and protect the shipowners from being harassed by litigation in other tribunals."

Providence, &c., Co. vs. Hill Mfg. Co., 109 U. S., 594.

In that case such a decree against the plaintiff was held binding in the State Court. Must not the same effect be given in this case to a decree against the shipowner, and in favor of the plaintiff in the State Court?

A judgment on the merits in one of two concurrent suits is a bar in the other.

Stout vs. Lye, 103 U. S., 68.

A decision of the Circuit Court of the United States in regard to the construction of an Act of Assembly of Maryland is conclusive in any case involving the same question between the same parties or their privies, even in the Court of Appeals of Maryland.

West. Tel. Co. vs. B. & O. R. R., decided June 13th, by Maryland Court of Appeals. Reported in Maryland "Law Journal," September 12, 1888.

"A judgment rendered by a Court of competent jurisdiction, * * * * which is unreversed or unannulled, is conclusive upon the parties to the controversy and their privies, and they are forever afterwards estopped or barred from reviving it in any new proceeding."

1 Herman on Estop, page 99.

2d. Because, aside from these decisions, the Acts of Congress are too plain to admit of any such construction as is attempted to be given to them by the plaintiff in error. The original Act of 1851 (sections 4,283 to 4,289 inclusive) provided a limitation of liability for *torts* only to "the amount or value of the interest of such owner and such vessel, and her freight then pending," and excepted the owners of canal boats, barges and lighters * * * from its operation.

The Act of 1884, ch. 121, sec. 18, extended this limitation to "all debts and liabilities," and changed the limitation from the *value* of the owner's interest in the vessel *to the proportion * * * that his individual share * * * bears to the whole.*"

It did not repeal sec. 4,289 expressly, nor will it be construed as repealing it by implication unless they cannot both stand together.

Henderson's Tobacco, 11 Wall, 652.
U. S. vs. Tynan, 11 Wall, 92.

Where there is a general system of laws relating to a subject, subsequent legislation must be construed as part of it, if it can be so construed.

Wilmot vs. Mudge, 103 U. S., 217.

That this is the legislative construction of the Act of 1884 is conclusively shown by the Act of 1886, ch. 421, sec. 4, which expressly repeals sec. 4,289.

If it be argued that the Act of 1886 is retroactive in its operation, we answer that "it is a rule of construction that all Statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

Sohn vs. Watterson, 17 Wall., 599.

There is no retrospective operation where rights are injuriously affected, unless the Court is driven to it by language so clear and positive as to leave no room to doubt that such was the intention of the Legislature.

Chew Heong vs. U. S., 112 U. S., 536.
Auffm'ordt vs. Rasin, 102 U. S., 622.

The repeal of sec. 4,289 was as to the owners of lighters, precisely the same as the original Act of 1851 was to the owners of vessels generally. For the first time it limited their liabilities. That Act had no retrospective operation, and did not affect contracts made or obligations incurred before its passage.

Kelly vs. Kelso, 5 Ohio St., 198.

The plaintiff in error has litigated this cause with extreme pertinacity, considering the small amount involved. He has carried his defence on the merits to the State Court of last resort, and his supposed defence under the Acts of Congress to the Federal Court of last resort. Having had full and impartial hearings upon every possible question involved, it must be manifest that the attempt to invoke the jurisdiction of this Court is frivolous, harassing and intended for delay, and unless the writ of error be dismissed the judgment below should be affirmed, with the Statutory allowance of damages.

Respectfully submitted,

B. HOWARD HAMAN,
WM. A. HAMMOND,
Attorneys for Bradshaw.

BRADSHAW'S EXHIBIT A.

UNITED STATES OF AMERICA,

District of Maryland, to wit:

At a Circuit Court of the United States for the Fourth Circuit, in and for the District of Maryland, begun and held at the Court House in the City Baltimore, on the first Monday of April, being the Second day of the same month, in the year of our Lord, one thousand eight hundred and eighty-eight. Present the Honorable:

HUGH L. BOND, *Circuit Court.*
THOMAS J. MORRIS, *Judge Maryland District.*
THOMAS G. HAYES, ESQ., *Attorney.*
GEORGE H. CAIRNES, *Marshal.*
JAMES W. CHEW, *Clerk.*

Among other were the following proceedings, to wit:

THOMAS C. CHAPPELL

vs.

JOHN B. BRADSHAW.

Agreement of counsel to docket case on appeal from the District Court in admiralty, on the papers and proceedings.

Filed 14 May, 1888.

THOMAS C. CHAPPELL
vs.
JOHN B. BRADSHAW. } *In the Circuit Court of the United States.*

JAMES W. CHEW, ESQ., *Clerk:*

Please docket suit in the Circuit Court of the United States for the Fourth District, in and for the Maryland District, on appeal from the District Court of the United States for the Maryland District, with the above titling. Appeal bond is hereby waived, and all formalities incident to appeals dispensed with, it being the intention of the libellant and libellee that said appeal be heard at the earliest convenience of the Court on the papers and proceedings in

said District Court, the appellee hereby reserving and not waiving any one objection to the jurisdiction.

FISHER, BRUCE & FISHER,
Libellant's Proctors.

W. A. HAMMOND,
B. H. HAMAN,
Libellee's Proctors.

The papers and proceedings of the District Court in the above entitled cause, are as follows, to wit:

Libel and Order of Court thereon.

Filed 26 April, 1888.

THOMAS C. CHAPPELL vs. JOHN B. BRADSHAW. } *In the District Court of the United States in and for the District of Maryland.*

To the Honorable, Thomas J. Morris, Judge of the District Court of the United States in and for the District of Maryland:

The libel of Thomas C. Chappell, of Baltimore county in the State of Maryland, in a cause for the limitation of his liability under the Act of Congress of 1884, Ch. 121, Sec. 18, respectfully alleges:

1. That he was the sole owner of a scow, of the value of about three hundred dollars, used by him in furthering the business of his Sulphuric Acid Factory at Hawkins' Point, upon the Patapsco river, in the State of Maryland, and yielding no freight.

2. That at about ten o'clock in the night on December 3d, 1885, said scow caught on fire, and, drifting from her moorings at said Hawkins' Point, was, by force of wind and water, brought into collision with a vessel anchored some distance off, below low water mark, in waters where tide ebbs and flows, and owned by John B. Bradshaw, an oysterman, of Somerset county, in the State of Maryland, and that the result of said collision was that said vessel was considerably injured; and the libellant further alleges that said scow was at the time of said collision valueless by reason of

said fire, and practically a total loss, and that his liability was, therefore, totally extinguished.

3. That said collision was occasioned without the design, neglect, privity or knowledge of the libellant, and occurred within the admiralty and maritime jurisdiction of this Court.

4. That afterwards, to wit: on or about January 6th, 1886, the said John B. Bradshaw, by B. Howard Haman, of Baltimore City, his attorney, instituted a suit for damages against the libellant in the Circuit Court for Baltimore county, claiming that said collision was due to the negligence of the libellant, and that subsequently said case was removed to the Superior Court of Baltimore City, and more recently to the Circuit Court for Howard county, where, after verdict rendered against the libellant for fifteen hundred dollars damages, judgment for that amount, with interest from December 6th, 1887, and costs, was on said day last mentioned entered up against the libellant; that the libellant afterwards appealed from said judgment to the Court of Appeals of Maryland, but that said judgment was affirmed by said Court.

5. And the libellant further alleges that at no stage of said case, from the inception thereof until the final affirmance of the judgment therein as aforesaid, was the right of the libellant under the Act of Congress of 1884, ch. 121, sec. 18, to have his liability for the consequences of said collision limited to the value of his interest in said scow after said collision, either raised or entertained, and he is advised that this Court will, notwithstanding said judgment, pass a decree perpetually restraining the said John B. Bradshaw, and the said B. Howard Haman, his attorney, and all other agents and attorneys of the said Bradshaw, from prosecuting said judgment, and according to the libellant the benefit of the Act of Congress of 1884, ch, 121, sec. 18.

6. And the libellant further alleges that said vessel was engaged in the business of dredging oysters, and was at the time of said collision on her return home from Baltimore without cargo, and that he has reason to believe that no

claim on account of said collision, other than that set up as aforesaid by the said Bradshaw, can or will be preferred.

The libellant, therefore, prays that he may be declared as entitled to the benefit of the Act of Congress of 1884, ch. 121, sec. 18, that the said scow, and all her appurtenances, if any, and her freight, if any, pending at the time of said collision, may be appraised by appraisers appointed by this Court, that the libellant may be authorized to give a stipulation, with good and sufficient sureties, according to the rules and practice of this Court, for such appraised value, such stipulation to be for the benefit of the said John B. Bradshaw, and of all other claimants who may, by actions or otherwise, intervene and prove to be legally entitled to compensation for losses sustained by reason of said collision, in proportion to the amount of the respective losses of all such claimants, that upon the due execution of such stipulation, the said scow, and all of her appurtenances, if any, as well as the owner thereof, may be discharged from all liability for all losses incurred by reason of said collision, and this Court issue a monition against all persons claiming damages by reason of said collision, citing them to appear before this Court and make due proof of their respective losses at or before a certain time to be named in said writ; that this Court will pass a restraining order, restraining, enjoining and prohibiting the said Bradshaw and the said B. Howard Haman, his attorney, and all other agents or attorneys of the said Bradshaw, from issuing, or causing to be issued, an execution or attachment upon the judgment, affirmed by the Court of Appeals of Maryland, as hereinbefore mentioned, or from attempting to enforce the same in any manner whatsoever, until the matters raised by this libel are determined, and that said restraining order may be then made perpetual by this Court; that a monition may forthwith issue to the marshal, commanding him to cite the said John B. Bradshaw to appear in this Court on or before some certain day named therein, and to answer on oath the matters aforesaid, and

that the libellant may have such other and further relief as to the Court may seem proper in the premises.

FISHER, BRUCE & FISHER,
Proctors for Libellant.

Sworn to before me this 26th day of April, 1888.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

Ordered that the prayer of the foregoing petition be set for hearing on the seventh day of May, 1888, and that until the hearing thereof the said Bradshaw and Haman be restrained from proceeding to enforce and collect judgment in said petition mentioned.

THOS. J. MORRIS,
District Judge.

Endorsed: "Copy served April 26, 1888. B. Howard Haman, for libellee."

Amended libel and order of Court thereon.

Filed 9 May, 1888.

THOMAS C. CHAPPELL vs. JOHN B. BRADSHAW. } *In the District Court of the United States in and for the District of Maryland.*

To the Honorable Thomas J. Morris, Judge of the District Court of the United States, in and for the District of Maryland:

The libel of Thomas C. Chappell, of Baltimore county, in the State of Maryland, in a cause for the limitation of his liability under the Acts of Congress in such cases made and provided, respectfully alleges:

1. That he was the sole owner of a lighter, of the value of about three hundred dollars, used by him in furthering the business of his sulphuric acid factory at Hawkins' Point, upon the Patapsco river, in the State of Maryland, and yielding no freight; and that although said lighter plied only between points within the State of Maryland, yet it

formed a link in the chain of commercial intercourse between said State and other States and foreign countries; said lighter being engaged in the transportation over the waters of the Patapsco river, which are public navigable waters of the United States, of merchandise coming from other States and foreign countries and destined to a point within this State on the route of said lighter, and in the transportation over said waters of goods shipped within this State and destined for and addressed to ports and places in other States.

2. That at about 10 o'clock in the night on December 3d, 1885, said lighter caught on fire, and, drifting from her moorings at said Hawkins' Point, was, by force of wind and water, brought into collision with a vessel, anchored in said Patapsco river some distance off, below low-water mark, in waters where tide ebbs and flows, and owned by John B. Bradshaw, an oysterman, of Somerset county, in the State of Maryland, and that the result of said collision was that said vessel was considerably injured; and the libellant further alleges that said lighter was, at the time of said collision, valueless, by reason of said fire, and practically a total loss, and that his liability was, therefore, totally extinguished.

3. That said collision was occasioned without the design, neglect, privity or knowledge of the libellant, and occurred within the admiralty and maritime jurisdiction of this Court.

4. That afterwards, to wit: On or about January 6th, 1886, the said John B. Bradshaw, by B. Howard Haman, of Baltimore city, his attorney, instituted a suit for damages against the libellant in the Circuit Court for Baltimore County, claiming that said collision was due to the negligence of the libellant, and that subsequently said case was removed to the Superior Court of Baltimore City, and more recently to the Circuit Court for Howard County, where, after verdict rendered against the libellant for fifteen hundred dollars damages, judgment for that amount, with interest from December 6th, 1887, and costs, was on said day last mentioned entered up against the libellant; that the libel-

lant afterward appealed from said judgment to the Court of Appeals of Maryland, but that said judgment was affirmed by said Court.

5. And the libellant further alleges that at no stage of said case, from the inception thereof until the final affirmance of the judgment therein as aforesaid, was the right of the libellant under the Acts of Congress aforesaid to have his liability for the consequences of said collision limited to the value of his interest in said lighter after said collision either raised or entertained, and he is advised that this Court will, notwithstanding said judgment, pass a decree perpetually restraining the said John B. Bradshaw, and the said B. Howard Haman, his attorney, and all other agents and attorneys of the said Bradshaw, from prosecuting said judgment, and according to the libellant the benefit of the Acts of Congress aforesaid.

6. And the libellant further alleges that said vessel was engaged in the business of dredging oysters, and was at the time of said collision on her return home from Baltimore, without cargo, and that he has reason to believe that no claim on account of said collision other than that set up as aforesaid by the said Bradshaw can or will be preferred.

The libellant, therefore, prays that he may be declared as entitled to the benefit of the Acts of Congress aforesaid; that the said lighter, and all her appurtenances, if any, and her freight, if any, pending at the time of said collision, may be appraised by appraisers appointed by this Court; that the libellant may be authorized to give a stipulation with good and sufficient securities according to the rules and practice of this Conrt, for such appraised value, such stipulation to be for the benefit of the said John B. Bradshaw and of all other claimants who may, by actions or otherwise, intervene and prove to be legally entitled to compensation for losses sustained by reason of said collision, in proportion to the amount of the respective losses of all such claimants; that upon the due execution of such stipulation the said lighter and all of her appurtenances, if any, as well as the owner thereof, may be discharged from all liability for all

losses incurred by reason of said collision, and this Court issue a monition against all persons claiming damages by reason of said collision, citing them to appear before this Court and make due proof of their respective losses at or before a certain time to be named in said writ; that this Court will pass a restraining order, restraining, enjoining and prohibiting the said Bradshaw and the said B. Howard Haman, his attorney, and all other agnts or attorneys of the said Bradshaw from issuing or causing to be issued an execution or attachment upon the judgment affirmed by the Court of Appeals of Maryland as hereinbefore mentioned, or from attempting to enforce the same in any manner whatsoever until the matters raised by this libel are determined, and that said restraining order may be then made perpetual by this Court; that a monition may forthwith issue to the Marshal, commanding him to cite the said John B. Bradshaw to appear in this Court on or before some certain day named therein, and to answer, on oath, the matters aforesaid, and that the libellant may have such other and further relief as to the Court may deem proper in the premises.

FISHER, BRUCE & FISHER,
Proctors for Libellant.

Sworn to before me this the 9th day of May, 1888.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

Leave to file the within amended bill is hereby this 9th day of May, 1888, by the District Court of the United States, in and for the District of Maryland, allowed, without prejudice to the restrainiug order, heretofore passed in this cause by said Court, said restraining order being continued in full force as to the libellee and all agents and attorneys of his.

THOMAS J. MORRIS,
District Judge.

Motion of respondent to strike out restraining order, &c.

Filed 9 May, 1888.

THOMAS C. CHAPPELL
vs.
JOHN B. BRADSHAW.
} *In the District Court of the United States for the District of Maryland.*

To the Honorable, the Judge of the said Court;

John B. Bradshaw, the respondent named in the above case, comes here into Court for the sole purpose of excepting to the jurisdiction of this Court in the premises under the facts and circumstances of this case. He, therefore, moves to strike out the restraining order which was passed by your Honor, and in support of his motion assigns the following reasons:

1. Because it is not competent for this Court, under the Acts of Congress and considering the relations which exist between Federal and State Courts, to issue process in the nature of an injunction to any State Court, or to any officer of a State Court, or to parties to suits in State Courts.

2. If this Honorable Court could in any case control the process of a State Court, it is very clear that it could not be done in a case where a State Court had jurisdiction over the subject matter, and a final judgment has been rendered in the State Court before the restraining process is applied for. The libellant did not choose to avail himself in the State Court of the defence which he here sets up. After judgment had been rendered in the State Court and had been affirmed by the Court of Appeals, he filed his petition before the chief judge of the Court of Appeals, asking for a writ of error on the ground that the judgment of the State Court involved a construction of an Act of Congress.

3. The Act of 1884 has no relation at all to such a case as is brought before the Court. It did not repeal or even affect in any way the Act of 1851. (See revised Statutes, sections 4,283 to 4,289 inclusive.)

4. In no event could the Act of 1884 be so construed as to repeal section 4,289 of the Act of 1851, which is in the

following language: "The provisions of this Act relating to the limitations of the liability of the owners of vessels, shall not apply to the owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation."

5. The libellant in the above case does not show that the accident came within the maritime jurisdiction of the United States.

6. Even if the Limited Liability Act applied to this case, the libellant has not shown that he is now in a position to avail himself of its provisions. He states, in section 1, that he *was* the sole owner of a lighter, &c. He does not state whether he has sold the lighter, and if he has not sold it, whether he is in a position to fulfill the conditions imposed upon him by the Limited Liability Act.

7. And for other good and sufficient reasons to be shown at the hearing of this motion.

WILLIAM A. HAMMOND,
B. HOWARD HAMAN,
For John B. Bradshaw.

Endorsed. "Service of copy admitted this 9th day of May, 1888. Fisher, Bruce & Fisher, Proctors for Libellant."

Decree.

Filed 10 May, 1888.

CHAPPELL vs. BRADSHAW. } *In the District Court of the United States for the District of Maryland.*

Upon the motion to show cause why the prayer of the libel in the above cause should not be granted, the counsel for the respective parties were heard, and it appearing to the Court that the libel does not state a case entitling the libellant to the injunction and the limitation of liability prayed for in said libel, and no amendment thereto being desired by libellant, it is ordered and decreed this 10th May,

1888, that the said libel be and the same is hereby dismissed.

THOS. J. MORRIS,
District Judge.

From which said decree the libellant, by his proctors, prayed an appeal in open Court here to the Circuit Court aforesaid, and it was granted him.

Opinion of the Circuit Court.

Filed 16 May, 188.

THOMAS C. CHAPPELL vs. JOHN B. BRADSHAW. } *In the Circuit Court of the United States. Appeal in Admiralty.*

This is a libel filed by Thomas C. Chappell to have his liability for damage in a cause of collision limited to the extent only of the value of the vessel in fault, which was owned by him.

The facts which are undisputed are these:

On the night of the 3d of December, 1885, in the Patapsco river, a lighter of the value of three hundred dollars, owned by libellant, drifting from her moorings, was carried by the wind into collision with a schooner belonging to John B. Bradshaw, the respondent here. The lighter was on fire, and damaged the schooner to the extent of $1,500. The lighter became a total loss and is valueless. On January 6, 1886, Bradshaw brought suit in a State Court of Maryland to recover the damages occasioned by alleged negligence of Chappel in the conduct and management of the lighter, and on the 6th day of December, 1887, recovered in that action a verdict for $1,500. The prayer of the libel is that Bradshaw may be restrained from attempting to enforce the judgment against the defendant beyond the value of his ownership in the lost lighter.

The question presented for adjudication is whether the provisions of any Act of Congress limiting the liability of vessel owners are applicable to the case of an owner of a

of the Act of 1884. Where a subsequent Statute can be so construed as not to bring it in direct conflict with an antecedent law, it will not be held by the Courts to repeal the former Statute. Repeals by implication are seldom allowed, and to do so in this instance would be to do violence to the intention of Congress, which appears clearly to have been to extend the Act of 1851, to exempt ship owners from liabilities not embraced in that Act, but not to embrace another class of vessel owners.

But after the bringing of the action by Bradshaw against Chappell, before mentioned, and prior to the recovery of the sum of $1,500 by the judgment of the State Court therein, Congress passed the Act of 1886, which extended the exemption of shipowners and the provisions of the Acts 1851 and 1884 to the owners of barges, canal boats and lighters, and to all vessels used on lake and river or inland navigation.

Congress put upon the Act of 1884, by the passage of this Act, the construction we have given it above, for if it had at first applied to canal boats and lighters it would not have been necessary to pass the Act of 1886.

But it is contended that the Act of 1886 is retroactive, and that as it does not contain the saving clause of the Act of 1884, referring to liabilities incurred prior to the passage of the Act, it must be held to include them.

As a rule no Statute is to be given a retroactive operation unless it appears to be the undoubted will of the Legislature to make it retroactive. All laws are supposed to determine matters in *futuro*, occurring after their passage, and no Statute should be construed to embrace past relations where to do so would affect not only the remedy but the value of claims, or demands, or interest. Now, on the 3d of December, 1885, it is determined by the judgment of the State Court that Bradshaw suffered damage at the hands of Chappell—damages to the extent of $1,500—for which he was entitled to be compensated out of the whole estate of the defendant. To hold that while the plaintiff was seeking to enforce compensation for the loss he had suffered Congress passed the Act of 1886, not to alter a remedy but to take away the substantial value of his claim, is to determine that

lighter where the accident occurred on the third day of December, 1885.

The first Act passed by Congress relating to the liability of ship owners was the Act of 1851, which is incorporated in Sections 4282-4289 of the Revised Statutes, the last of which sections provides that it shall not apply to the owners of canal boats, lighters or barges. And so far as the Act of 1851 is concerned it can have no application to the facts in this case, unless some subsequent legislation has given it such application.

In 1884 Congress passed another Act in relation to the subject, which is found in Statutes at Large, ch. 121, sec. 18, which is in the following words: "That the individual liability of a ship owner shall be limited to the proportion of any or all debts and liabilities that his individual share bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending." The section then provides that it shall not apply to liabilities incurred prior to its passage, nor prevent all the owners being joined in one action.

It will be seen upon comparing this section with the Act of 1851, embraced in sections 4,282–4,289 inclusive, in the revised Statutes, that while the Act of 1851, related to losses occurring to freighters by reason of fire, collision, embezzlement, the Act of 1884 limits responsibility of all ship owners also for any and all debts and liabilities. This Act, whether it be an amendment to the Act of 1851 or an independent Statute, cannot be construed to repeal the last section of the Act of 1851, relating to the liability of owners of barges and lighters, because it refers only to the liability of ship owners, and their vessels, which must mean ships, and there are no words in it which signify that it was intended to a repealing Statute. It appears to be another section intended to take its place at the end of the Act of 1851, as that Act is given in the Revised Statutes. It is another section extending the exemption of ship owners to all or any debts and liabilities of the ship, except seaman's wages and liabilities incurred before the passage

Congress did a very unjust thing; and though it was, perhaps, within the power of Congress so to do, the rule that where such intention is not clearly expressed the Statute shall be construed to apply only to liabilities arising after its passage, ought not to be reversed to give the law that effect.

I am of opinion that the Act of 1886 has no application to liabilities incurred previous to its passage.

The libel will be dismissed with costs.

Decree of the Circuit Court.

Filed 16 May, 1888.

THOMAS C. CHAPPELL
vs.
JOHN B. BRADSHAW.
} *In the Circuit Court of the United States for the District of Maryland.*

The above cause having been heard and considered, upon the motion to show cause why the prayer of the libel should not be granted, it is ordered and decreed this 16th day of May, A. D., 1888, that the said libel be and the same is hereby dismissed, with costs, in both the District and the Circuit Court, which are awarded to the respondent.

HUGH L. BOND,
Circuit Judge.

District of Maryland, to wit:

I, James W. Chew, Clerk of the Circuit Court of the United States for the Fourth Circuit, in and for the District of Maryland, do certify that the foregoing is a true transcript of the record and proceedings of the said Circuit Court in the therein entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court, on this 28th day of September, A. D., 1888.

JAMES W. CHEW,
Clerk of said Circuit Court.

[SEAL.]

THOMAS C. CHAPPELL, *Plaintiff in Error,* vs. JOHN B. BRADSHAW, *Defendant in Error.*	IN THE *SUPREME COURT* OF THE *UNITED STATES.*

To THOMAS C. CHAPPELL, *Plaintiff in Error, and*
W. A. FISHER, ESQ., *his Attorney:*

I herewith hand you copies of motions to dismiss and affirm, in the above entitled case, together with copies of brief in support thereof, and an exhibit; and notify you that the same will be filed in the Supreme Court of the United States on Monday, the 22d day of October, 1888.

Very respectfully yours,

W. A. HAMMOND,
Of Counsel for the Defendant in Error.

Service of the copy of the above, and of the brief and exhibit therein mentioned, admitted the 29th day of September, 1888.

W. A. FISHER.